

# Tales from the Dark Side of the Archives: Making History in Hawai‘i Without Hawaiians

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[H]e makemake ko‘u e pololei ka moolelo o ko‘u one hanau, aole na ka malihini e ao mai ia‘u i ka moolelo o ko‘u lahui, na‘u e ao aku i ka moolelo i ka malihini.

I want the history of my homeland to be correct, it is not the foreigner who will teach me the history of my people, it is I who shall teach the foreigner.

—Samuel M. Kamakau<sup>1</sup>

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I have adopted modern orthography for Hawaiian language (‘Ōlelo Hawai‘i) terms in this article where applicable, using the ‘okina, representing a glottal stop, and the kahakō to denote lengthening of the vowel sound. However, I do not add these markers when quoting original materials from nineteenth-century court records, laws, and newspapers. Any errors in translations, orthography, and spelling are my own.

The title of this article, which was somewhat cheekily inspired by the television series, *Tales from the Darkside*, has a nuanced meaning that I invite readers to reflect upon. The opening sequence of the show began with this rather ominous message:

Man lives in the sunlit world of what he believes to be reality. But there is, unseen by most, an underworld, a place that is just as real, but not as brightly lit . . . a darkside.

*Tales From the Darkside* (Laurel Entm’t, Inc. & Tribune Entm’t 1983).

<sup>1</sup>Samuel M. Kamakau, *Hooheihēi ka Nukahalale*, KE AU OKOA, Oct. 16, 1865, at 1.

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## I. INTRODUCTION

In today’s world, the ways in which Native Hawaiian<sup>2</sup> history has been framed drastically departs from the way Hawaiian historian Samuel Kamakau envisioned and advocated to Hawaiian Kingdom citizens in 1865—foreigners should not be teaching Hawaiians about their own history—and yet, that is exactly what has happened. For Native Hawaiians, our continuing struggle for self-determination has often involved questions relating to our history and a critique of how we have been represented or excluded from various accounts. As noted by scholar Linda Tuhiwai Smith, “Under colonialism indigenous peoples have struggled against a Western view of history and yet been complicit with that view. We have often allowed our ‘histories’ to be told and have become outsiders as we heard them being retold.”<sup>3</sup>

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<sup>2</sup> The terms “Native Hawaiian,” “Kanaka ‘Ōiwi,” and “Kanaka Maoli,” are used interchangeably in this article. “Kanaka Maoli” is defined as a “[f]ull-blooded Hawaiian person.” MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (rev. & enlarged ed. 1986). In modern times, it refers to all persons of Native Hawaiian ancestry without regard to blood quantum. See Melody Kapilialoha MacKenzie, *Introduction*, in NATIVE HAWAIIAN LAW: A TREATISE xi, xiv–xv (Melody Kapilialoha MacKenzie et al. eds., 2015). The term “‘Ōiwi” is defined as “Native, native son.” PUKUI & ELBERT, *supra*, at 280.

<sup>3</sup> LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 33 (2005).

Chief Judge James S. Burns (retired) is a respected jurist with an illustrious 30-year law career.<sup>4</sup> He is known for his “calm demeanor,” and his “common-sense approach to the law and his ability to treat people with dignity and respect.”<sup>5</sup> Mindful of his many contributions and the well-deserved public accolades he has garnered, I worried about the potential ramifications for contradicting the history posited by Judge Burns in his article, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*<sup>6</sup> Indeed, Native Hawaiians have been taught to respect their elders: “I pa‘a i kona kupuna ‘a‘ole kākou e puka.”<sup>7</sup> This poetical saying, known as an ‘Ōlelo No‘eau, is said to remind us to respect the senior line because they came first.<sup>8</sup> And while Judge Burns is entitled to our profound gratitude for his many years of service, as a Native Hawaiian, I have an overriding commitment to honor my ancestors, who have for over a century been effectually silenced by outsiders telling the history of our own people.

Judge Burns, like many others, recounts a Westerner’s view of Native Hawaiian history where Native Hawaiians existed in a feudal and war-ridden society with ali‘i and mō‘ī (king) exercising absolute authority.<sup>9</sup> According to this Western narrative, once Europeans arrived, Native Hawaiians had little power or control, were forced to adopt European-American laws, and were ultimately betrayed by their own leaders.<sup>10</sup>

How this oft-repeated story has become so deeply entrenched in our legal system requires us to look critically at the sources upon which many historians rely and the sources they overlook. Quite simply, the available corpus of Hawaiian-language materials, hand-written and published, is the largest of any native language in the Pacific, and the largest of any indigenous language in the United States and perhaps in all of native North America.<sup>11</sup> The corpus exceeds a million pages of printed text<sup>12</sup>—the

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<sup>4</sup> *End of Judge Burns’ Career Posits a Lesson*, HONOLULU ADVERTISER, Apr. 20, 2007, <http://the.honoluluadvertiser.com/article/2007/Apr/20/op/FP704200332.html>.

<sup>5</sup> *Id.*

<sup>6</sup> 38 U. HAW. L. REV. 213 (2016).

<sup>7</sup> MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 136 n.1251 (1983). This ‘Ōlelo No‘eau is translated as: “Had our ancestress died in bearing our grandparent, we would not have come forth.” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Burns, *supra* note 6, at 217–23.

<sup>10</sup> *Id.* at 214, 232–38, 253.

<sup>11</sup> See discussion *infra* Section III.C.; see also M. PUAKA NÖGELMEIER, MAI PA‘A I KA LEO: HISTORICAL VOICE IN HAWAIIAN PRIMARY MATERIALS, LOOKING FORWARD AND LISTENING BACK 1 (2010); Noelani Arista, *Ka Waihoia Palapala Manaleo: Research in a Time of Plenty, Colonialism and Ignoring the Hawaiian Language Archive*, in INDIGENOUS TEXTUAL CULTURES (forthcoming 2017) (manuscript at 1) (on file with author).

remainder, which is hand-written and located in various archives locally, nationally, and internationally, is left largely uncharted. It is estimated that a very tiny fraction, less than one percent of the available corpus, has been translated and used.<sup>13</sup> Entire books of history have been extracted from this tiny fraction of the available corpus<sup>14</sup>—the rest has been left to “obscurity” in the “dark side” of the archives.

The history that has been gleaned from this tiny fraction has become known as the “authoritative canon” and the so-called foundation of Hawaiian knowledge and history.<sup>15</sup> However, the translations upon which these source materials were founded upon are flawed—the original works were simplified, reordered, and decontextualized to fit and reinforce Western intellectual paradigms.<sup>16</sup> Worse still, the authoritative canon comprising the “entirety” of Native Hawaiian history eclipses the larger body of source materials available.

The inherent problem of an ignored Hawaiian language repository “is structural and attitudinal.”<sup>17</sup> Scholars today interested in Hawai'i history are not faced with archival destruction, as has occurred in many Native American and other indigenous sites of colonial contest, and is currently occurring in our world today.<sup>18</sup> Instead, these sources have been devalued, ignored by scholars, while colonial processes over time have resulted in what Ngūgĩ wa Thiong'o refers to as a cultural bomb:

The effect of a cultural bomb is to annihilate a people's belief in their names, in their languages, in their environments, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves. It makes them see their past as one wasteland of nonachievement and it makes them want to distance themselves from that wasteland.<sup>19</sup>

Judge Burns, like so many other historians and jurists before him, whether through honest ignorance or purposeful omission, has relied on research that comprises only a small portion of what is available—the result: deeming this research as “sufficient” to represent the “official” history of the Native Hawaiian people. Unfortunately, however, this is not

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<sup>12</sup> See NOGELMEIER, *supra* note 11, at XIII, 2.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at XIII.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 29.

<sup>17</sup> Arista, *supra* note 11, at 2.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> NGŪGĨ WA THIONG'O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 3 (1989).

the biggest problem with the article's selective iteration of Hawai'i's history.

Indeed, as an initial matter, the article relies on inadequate "historical sources" to validate its Western narrative. Citation to such sources as a seventh-grade textbook<sup>20</sup> and HawaiiHistory.org<sup>21</sup> does not meet the requisite academic rigor commensurate with a scholarly legal publication. Nor does his extensive quotation of outdated secondary sources such as a 1993 National Park Service report about three historic sites on Hawai'i island<sup>22</sup> meet the standard of citing relevant authority to support a position being advocated that impacts an entire native population. Worse still is the complete omission of recent relevant authority from leading experts in the fields of Native Hawaiian history, culture, and politics.<sup>23</sup> One can only assume that we are expected to overlook these faults as minor details insofar the article's underlying premise must be true given the author's stature as a well-regarded jurist.

But such a position cannot and should not be supported. For far too long, Native Hawaiians' history has been told by outsiders. It is vital today for Hawaiians to tell their own history—to give life back to the language, history, and knowledge that has been overwritten, hidden, fractured, and destroyed by colonial regimes. As Smith explained:

Indigenous peoples want to tell our own stories, write our own versions, in our own ways, for our own purposes. It is not simply about giving an oral account or a genealogical naming of the land and the events which raged over

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<sup>20</sup> See Burns, *supra* note 6, at 225 n.59, 226 n.70 (referencing *History of the Hawaiian Kingdom*, a seventh-grade textbook); see also discussion *infra* Section II.A.1.

<sup>21</sup> See Burns, *supra* note 6, at 217 n.21 (relying on the website HawaiiHistory.org to describe "historical facts"); see also discussion *infra* Section II.A.1.

<sup>22</sup> See Burns, *supra* note 6, at 218 n.22 (referencing and substantially quoting a 1993 National Park Service historic resource study); see also discussion *infra* Section II.A.2.

<sup>23</sup> See, e.g., LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? (1992) (deconstructing the Māhele process); SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (2000) (examining law's colonizing impact as reflected in nineteenth century district court records); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002) (detailing the history and politics of the Hawaiian Kingdom through 1887); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004) (documenting native resistance to colonialism in Hawai'i); DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE (2007) (describing the traditional resource management system); KAMANAMAICALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014) (interrogating ali'i agency through various actions, including the Māhele process); MARIE ALOHALANI BROWN, FACING THE SPEARS OF CHANGE: THE LIFE AND LEGACY OF JOHN PAPA 'ŪI 9 (2016) (providing detailed historical biography of an influential statesman and Hawai'i Supreme Court Justice).

it, but a very powerful need to give testimony to and restore a spirit, to bring back into existence a world fragmented and dying.<sup>24</sup>

It is believed that when “the truth comes out,” we can achieve a small measure of justice and this will enlighten our decisions about the future.<sup>25</sup> For indigenous peoples, however, “history is mostly about power. It is the story of the powerful and how they became powerful, and then how they use their power to keep them in positions in which they can continue to dominate others.”<sup>26</sup> And while it is a truism that history is written by the winners, it is misleading because in both history and law “it is the *writer* who determines who wins and who loses by setting the questions to be asked, by including and excluding evidence, by defining and assessing significance, in short, by controlling the narrative version of the past that will stand for the fleeting past events.”<sup>27</sup>

In law, whether it is a scholar or jurist, their concept of history, as embodied in legal storytelling and perpetuated by the courts in so-called “neutral decisions,” continues to “obfuscate important histories, particularly for oppressed peoples, in a search for finite evidence”<sup>28</sup> insofar as “[f]acts are assembled to tell a story whose conclusion is determined by others.”<sup>29</sup> Later, these histories become enshrined as *stare decisis* and later interpreted, particularly by jurists and legal practitioners, as the “official history” of a people. This article traces the origins of this practice, and the ramifications for subscribing to this hegemonic methodology.

In Part II, I describe at length the varying (but thematically similar) professional research standards that law students, attorneys, scholars, and judges are expected to meet—especially in the context of both “doing” and “using” history. I then demonstrate how the article at issue does not objectively meet these standards when you carefully evaluate the underlying probity of cited sources contained in the article.

In Part III, drawing upon the insights developed by scholars of critical outsider jurisprudence, indigenous studies, critical archival studies, and

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<sup>24</sup> SMITH, *supra* note 3, at 28.

<sup>25</sup> *Id.* at 34.

<sup>26</sup> *Id.* Indeed, “[h]istory, it is often suggested, is written by the winners. Yet losers also write history; they just don’t get translated.” ROBERT I. FROST, *THE NORTHERN WARS: WAR, STATE AND SOCIETY IN NORTHEASTERN EUROPE, 1558–1721*, at 14 (2000).

<sup>27</sup> Eric H. Reiter, *Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond*, 8 *INDIGENOUS L.J.* 55, 56 (2010) (emphasis added).

<sup>28</sup> Jeremiah Chin, *Red Law, White Supremacy: Cherokee Freedmen, Tribal Sovereignty, and the Colonial Feedback Loop*, 47 *J. MARSHALL L. REV.* 1227, 1230 (2014).

<sup>29</sup> Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *DUKE L.J.* 625, 646.

historiography, I analyze the histories that have been told about Native Hawaiians by attorneys, judges, and scholars. I start by conceptualizing “Law as an Archive”—a repository of historical knowledge that contains records that must be critically evaluated. To do this, we must unearth the embedded historical record contained in statutes and case law, and challenge the teleological narratives that it produces. In doing so, we see reflected in these records decisions regarding what is “pertinent” and what is “irrelevant.” We see how law both develops and declares its own authority while obfuscating and sanctioning its own records. Moreover, we see how law perpetuates the continued institutional support for dominant viewpoints in the endorsement of these one-sided histories, and how law has been used to effectually silence ‘Ōiwi voice. Although I briefly critique several popular historical works, including Gavan Daws’ *Shoal of Time*, and Ernest Andrade’s *Unconquerable Rebel*, I pay particular attention to a source that has long been relied upon by historians and scholars: Ralph S. Kuykendall’s *The Hawaiian Kingdom*.

## II. “THAT’S ONE FOR THE HISTORY BOOKS”: APPLICABLE PROFESSIONAL RESEARCH STANDARDS FOR STUDENTS, ATTORNEYS, SCHOLARS, AND JUDGES

Ha‘a ho‘i ka papa; ke kāhuli nei.

Unstable is the foundation; it is turning over.<sup>30</sup>

For purposes of clarification, my article does not focus on the substantive errors contained in Judge Burns’ article—indeed, my colleagues tackle those complex issues separately.<sup>31</sup> Instead, my approach is guided by the following ‘Ōlelo No‘eau: “Ha‘a ho‘i ka papa; ke kāhuli nei.” This means, if the foundation is unstable, it will topple over.<sup>32</sup> In like fashion, at the heart of Judge Burns’ article exists a flawed legal history that is largely supported by sources that are not only questionable, but lack credibility. Once these sources are stripped away, many of his arguments crumble.

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<sup>30</sup> PUKUI, *supra* note 7, at 49 n.390.

<sup>31</sup> Melody Kapilialoha MacKenzie & D. Kapua‘ala Sproat, *Conflicting Histories: Reclaiming Hawai‘i’s Crown Lands Trust in Response to James S. Burns*, 39 U. HAW. L. REV. 481 (2017); Jonathan Kamakawiwo‘ole Osorio & B. Kamanamaikalani Beamer, *Sullyng the Scholar’s Craft: An Essay and Criticism of Judge James S. Burns’ Crown Lands Trust Article*, 39 U. HAW. L. REV. 469 (2017); Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past*, 39 U. HAW. L. REV. 631 (2017).

<sup>32</sup> See PUKUI, *supra* note 7, at 49 n.390.

Denouncing another scholar's work requires careful consideration. Indeed, because of the author's stature as a respected jurist, and because his article was selected for publication in a law review journal<sup>33</sup> sponsored by the only law school in the State of Hawai'i, it is bestowed with the imprimatur of authoritativeness. But it is for this exact reason that it must be confronted head on—this article may subsequently be relied upon by the unwary scholar, student, practitioner, or jurist.

To competently address this article requires us to first examine the research standards applicable to our profession. In this case, it is best to start with the professional standards that are expected from legal scholars in academia since Judge Burns opted to publish this article in a law review. According to Professor Roger C. Cramton, "law school is more than a place that trains men and women to plead causes and to advise clients; it is a place for dialogue, for reflection, for definition and comparison of

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<sup>33</sup> Some might argue that the very publication of this article is systemic of a larger institutional issue. Specifically, the problem lies squarely with legal academia's scholarly journals which are overwhelmingly student-led and edited. Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 909 (2006) ("[P]retty much everyone in the academy knows that what law professors do can't really be called 'scholarship' because there are no quality standards . . ."). One of the common criticisms directed toward law review articles is that "[s]tudent editors lack the knowledge and experience to edit articles and often do not understand the articles they are editing." Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 15 (2013); Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 STAN. L. REV. 1147, 1149 (1995) ("How can second-year graduate students with no formal training in research scholarship choose and edit the work that represents the highest accomplishments of their own professors?"); Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1, 7–8 (1986) ("Law today is too complex and specialized; and legal scholarship is too theoretical and interdisciplinary. The claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible.").

Another criticism is that the lack of impartiality has led to the selection of articles not based on merit but rather on author prestige. See Wise, *supra*, at 21; Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1142 ("[A]rticles are chosen on the basis of the perceived prestige of the author . . ."). This can result in other related issues insofar the system thus encourages some authors to "be lazy and not produce their best work because they know student editors will correct deficiencies in their articles for them . . ." Wise, *supra*, at 21 (first citing Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 605–06 (2004); and then citing John P. Zimmer & Jason P. Luther, *Peer Review as an Aid Selection in Student-Edited Legal Journals*, 60 S.C.L. REV. 959, 962–63 (2009)). Regardless of what occurred with Judge Burns' article, the failure to meet professional standards ultimately rests with the author—not students. It is wholly inappropriate to delegate such responsibility or attribute any deficiencies to students.



values.”<sup>34</sup> A quality law school cultivates an environment where a community of scholars can be devoted to the inquiry and development of “new ideas and values concerning law, legal institutions, and the never-ending quest for justice.”<sup>35</sup> The expression of these ideas and values are reflected in the careful development of scholarship, which is, according to Professor Anthony T. Kronman, “an antidote to the cynical carelessness about truth that advocacy encourages.”<sup>36</sup> Advocacy, the “construction of a convincing or persuasive argument” is a skill central to law school teaching.<sup>37</sup> The defining goal of advocacy is “the production of conviction rather than knowledge[,]”<sup>38</sup> insofar as the interest is in persuading an audience of the “truth of the beliefs [the advocate] wants them to accept.”<sup>39</sup> “Advocacy is distinctive, not because it is wholly unconcerned with the truth, but because it is concerned with truth only as an aid to persuasion . . . .”<sup>40</sup> For “powerful psychological reasons,” the advocate has to persuade himself of the truth of what he wishes others to accept.<sup>41</sup>

Thus, according to Kronman, law teachers have a “moral responsibility . . . to do what they can to prevent the indifference to truth that advocacy entails from hardening into a cynical carelessness about efforts to discover the truth concerning the various aspects of human social life that the law encompasses.”<sup>42</sup> Scholarship, the “antidote” to this carelessness, is premised on “inquiry devoted to the discovery of truth.”<sup>43</sup> An ethical scholar “seeks knowledge for its own sake, not for some further purpose”<sup>44</sup> because the “goal of scholarship” is to “understand the world as it truly is . . . .”<sup>45</sup> The best and most meaningful scholarship “emerges from a community of scholars that functions in the way that only the best universities can: through an endless process of discovery, reflection, and

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<sup>34</sup> Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 2 (1986) (referencing a speech that Cramton gave in 1985).

<sup>35</sup> *Id.*

<sup>36</sup> Anthony T. Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 967 (1981).

<sup>37</sup> *Id.* at 961.

<sup>38</sup> *Id.* at 963.

<sup>39</sup> *Id.* at 961.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 965.

<sup>43</sup> Cramton, *supra* note 34, at 3.

<sup>44</sup> Kronman, *supra* note 36, at 967.

<sup>45</sup> *Id.* at 968.

dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding.”<sup>46</sup>

It is within this community of scholars that I hope to spur a “process of discovery” or perhaps a moment of meaningful reflection for those who have written about the history of Native Hawaiians. While I and others readily acknowledge that “any scholarly achievement is partial, one-sided, transient, and inevitably influenced in its inception and execution by the scholar’s habits, preferences, [and] values[.]”<sup>47</sup> it is critical that we also recognize “that every scholarly endeavor, no matter what its subject, aims to state something true . . . .”<sup>48</sup> As Professor Kronman expressed:

[T]ruth is a common meeting ground . . . . and the affirmation of its value is, in an important sense, an affirmation of the ideal of community . . . . If one values community—and much of human life would be pointless if one did not—it is important to care about the truth, for a commitment to truth is one of the things that most powerfully and effectively express the idea of our common humanity and sustain us in our efforts to achieve it.<sup>49</sup>

What does it mean, however, to devote yourself to the “discovery of truth?”<sup>50</sup> What standards do we employ as scholars in our endeavor to state “something true”? Before we answer this seemingly easy question, however, perhaps it is best to start from the beginning. As legal scholars and practitioners, we all started as law students—as such, what is expected from them?

Attorneys are expected to possess a “specific set of skills and values upon entering the profession of law[.]” and law schools in turn must “teach these skills and values in the legal education process.”<sup>51</sup> From the very

<sup>46</sup> Cramton, *supra* note 34, at 3.

<sup>47</sup> Kronman, *supra* note 36, at 967.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 966–67.

<sup>50</sup> *Id.* at 967 (stating that inquiry should be devoted to the discovery of truth).

<sup>51</sup> Bryan F. Taylor, *Through the Looking Glass: Perceptions on the Law School Learning Experience*, 61 LOY. L. REV. 275, 280 (2015). According to the American Bar Association, there are ten fundamental lawyering skills necessary for competent lawyering: problem solving, legal analysis, legal research, factual investigation, communication, counseling clients, negotiation, advising clients about litigation and alternative dispute-resolution procedures, organization and efficient management of legal work, and recognizing and resolving ethical dilemmas. A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 135 (1992). Since that time, other reports were published expanding and furthering the findings of the 1992 report. *See, e.g.*, ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

beginning, law students are inculcated to “think like an attorney.”<sup>52</sup> For law students across the United States, one of the first places they learn how to apply this skill<sup>53</sup> is in legal research, which is part of the required first year curriculum.<sup>54</sup> In legal research, students are taught about the types of primary and secondary legal authorities and the various methodologies for accessing these materials.<sup>55</sup> Students are not only taught how to locate relevant legal authority, they are also taught how to critically evaluate it. Over time, students are taught to “probe the text” and take a critical attitude toward everything they read—to “ask questions, play devil’s advocate, look for contradictions, omissions, mistakes.”<sup>56</sup> When students are learning how to assess the value of secondary authorities, they are taught to ask the following types of questions: “Does the writer have a comprehensive grasp on the literature, *i.e.*, does the writer cite germinal and recent sources, as well as other relevant evidence, experiences, and/or information essential to the issue? Is the information accurate and directly relevant to the question at issue?”<sup>57</sup> In sum, students are expected to know: 1) how to find relevant legal authority; and 2) how to critically evaluate legal authority.<sup>58</sup>

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<sup>52</sup> Taylor, *supra* note 51, at 295 (explaining that some law school curricula are designed to teach students “how to think” and not “how to do”).

<sup>53</sup> As explained by a former law student, one part of the law school curriculum that taught students how to “think like an attorney,” was legal research and writing: “I think research and writing are essential to practicing law . . . . It does as far as you need to reason and logically work out issues, and decide what’s relevant in a fact pattern.” *Id.* at 296 (quoting interview).

<sup>54</sup> AM. BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010, at 15 (Catherine L. Carpenter ed., 2012) (noting that the standard 1L curriculum includes Legal Research and Writing).

<sup>55</sup> Over the years, students have used a wide-range of legal research texts to learn these skills, including: STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH (9th ed. 2009); ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW (12th ed. 2005); MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL (12th ed. 2016); CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH (7th ed. 2008); KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH (2009); AMY E. SLOAN, BASIC LEGAL RESEARCH (5th ed. 2012).

<sup>56</sup> See ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS 28 (4th ed. 2011).

<sup>57</sup> *Id.* at 29.

<sup>58</sup> There are claims, however, that law schools are graduating students who cannot competently perform legal research. See, e.g., Paul Douglas Callister, *Beyond Training: Law Librarianship’s Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7, 9–11 (2003) (using reports, studies, and anecdotal evidence to demonstrate the lack of adequate legal research skills in law students and law graduates); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BAL. L.

After law school, attorneys learn how to apply these lessons in their practice. And while there is no definitive measure for assessing an attorney's performance of minimally competent research, there are a variety of guiding principles such as: the Model Rules of Professional Conduct,<sup>59</sup> court rules,<sup>60</sup> judicial decisions censuring attorneys for inadequate research,<sup>61</sup> and malpractice and ineffective assistance claims.<sup>62</sup> As summarized by Professor Ellie Margolis:

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REV. 173, 181 (2010) (“[L]aw schools are consistently told that they are graduating students who cannot competently perform legal research.”).

<sup>59</sup> The Model Rules of Professional Conduct contain a number of provisions that relate to an attorney's ongoing obligation to perform competent research. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r.s. 1.1, 3.1 (AM. BAR ASS'N 2014). For example, Rule 1.1 provides, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2014). The comments to Rule 1.1 clarify that, “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.” *Id.* r. 1.1 cmt.

Scholars often cite to Model Rule 1.1 and its commentary for purposes of establishing that an attorney has an ethical duty to perform adequate legal research. *See, e.g.*, Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 613 (2000) (explaining that the requirement of competency under Rule 1.1 is directly applicable to a lawyer's legal research); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 90 (2000) (“It has long been recognized that the ability to perform adequate legal research is a component of Rule 1.1.”); Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing*, 29 NOVA L. REV. 49, 50–51 (2004) (noting that although Rule 1.1 necessitates the performance of legal research for purposes of competent representation, many attorneys provided legal advice without conducting any research).

<sup>60</sup> Federal and State Courts have instituted several rules that address the level of legal research expected from counsel. *See* Marguerite L. Butler, *Rule 11-Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 681–82 (2002). Rule 11 of the Federal Rules of Civil Procedure, and Rules 28 and 38 of the Federal Rules of Appellate Procedure are most commonly used by the courts to sanction lawyers who fail to meet the standard for competent legal research. *See* Ellie Margolis, *Surfin' Safari-Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 96 (2007). Most times, lawyers are sanctioned because an attorney's sub-par legal research has resulted in poorly crafted, or unsupported pleadings and briefs. *Id.* at 96.

<sup>61</sup> *See, e.g.*, Office of Disciplinary Counsel v. Danmeyer, No. SCAD-13-0000451, 2013 WL 3776234, at \*1 (Haw. Sup. Ct. July 17, 2013). In *Danmeyer*, the Hawai'i Supreme Court publicly censured an attorney for her failure “to perform basic legal research.” *Id.* By failing to “inquire with the relevant government authorities regarding the veracity of the ‘redemption theory’ of finance,” the attorney “failed to demonstrate the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary to fulfill her

The competent lawyer must, first and foremost, provide courts with current, accurate authority to support the result being advocated. If a lawyer does not provide the court with this authority, the court is likely to investigate the lawyer's research process. The investigation will focus on whether the lawyer employed standard research techniques in an attempt to locate relevant, controlling authority. If the lawyer did not engage in standard research techniques, negative consequences ranging from public embarrassment to sanctions will follow.<sup>63</sup>

While there has been much written about how to conduct legal research,<sup>64</sup> it is much more difficult to ascertain how much legal research is sufficient and how much support must be offered for a legal argument to meet minimal competency.<sup>65</sup> While there is no definitive source providing a clear answer, according to Margolis, a review of a variety of court rules and legal claims addressing aspects of competent research reveal two consistent themes: "[A] competent legal researcher must employ research techniques that are standard in the field, and the result of that process must provide the decision-maker with adequate authority to make an informed decision."<sup>66</sup>

Thus, what standard techniques should be employed by attorneys, legal scholars, and judges when delving into the field of "legal history"? As an initial matter, both historians and legal practitioners criticize the use of history by non-historically-trained judges and legal scholars.<sup>67</sup> Specifically,

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professional obligations" in violation of Rule 1.1 of the Hawai'i Rules of Professional Conduct. *Id.* The attorney's behavior "warrant[ed] a period of suspension, in the absence of mitigating factors." *Id.*

<sup>62</sup> See Margolis, *supra* note 60, at 102–06 (citing numerous examples of malpractice cases where the courts considered the adequacy of an attorney's research).

<sup>63</sup> *Id.* at 118.

<sup>64</sup> See, e.g., sources cited *supra* note 55.

<sup>65</sup> See Margolis, *supra* note 60, at 86.

<sup>66</sup> *Id.* at 87.

<sup>67</sup> Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 483 (2008); see also Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 553–54 (1995) ("Too often, legal scholars make a fetish of one or two famous primary sources, and consider their historical case made."). See generally Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119 (critiquing the Court's misuse of history from the perspective of a historian).

Many of the criticisms are leveled at originalists who seek "legal truth" from the intentions of original law-makers, most often being the Framers of the U.S. Constitution. See, e.g., LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 301, 313–21 (1988) (examining the selective use of history to support legal analysis based on original intent); Rebecca Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL'Y 69, 74 (2003) ("The accusations of selective use of history, . . . incomplete history, sloppy or strategic methodology, and lack of candor are all devastating critiques of the originalists,

those who misuse history are charged with “disregarding the professional standards by which history ought to be written in order to marshal historical authority for the purpose of persuading the reader in favor of the author’s desired result.”<sup>68</sup> The concern is that in the context of litigation, attorneys and judges use history to achieve a particular goal, whether it is to win their case, bolster an argument, or to justify a holding in a decision.<sup>69</sup> Indeed, one can “hardly expect detached, unbiased history to appear within the context of such an argument, for though advocates may pay lip service to the truth, their main objective is victory.”<sup>70</sup> For this reason, some commentators have argued that the use of history should be curtailed or only permitted with an adherence to (or recognition of) the standards of professional historiography.<sup>71</sup> This is because the failure to “do history” correctly can have a profound, long-term impact with broad-ranging consequences. For example, as discussed more thoroughly in Part III below, the selective use of history has adversely impacted Hawai‘i’s legal historiography and in turn, this has dramatically shaped the discourse surrounding Native Hawaiian rights.

Debating whether it is advisable to use history in law is a moot point<sup>72</sup> because the fact remains that courts, legal practitioners, and scholars will continue to “do history”—in fact, there is evidence that this is a growing trend.<sup>73</sup> And while it is probably “unrealistic and impractical to expect

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because their justifications for using history depend on a claim of truth and objectivity.”).

<sup>68</sup> Festa, *supra* note 67, at 483. The methodologically weak and selective use of history in legal proceedings is derogatorily referred to as “law office history.” *Id.*; see also Flaherty, *supra* note 67, at 554 (“Here legal scholars, in what in its worst form is dubbed ‘law office history,’ notoriously pick and choose facts and incidents ripped out of context that serve their purposes.”).

<sup>69</sup> Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 382 (1998).

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662–94 (1987) (providing a list of rules for “using history responsibly” in law by originalists); Festa, *supra* note 67, at 537 (endorsing ideology that lawyers and judges should strive to approximate the standards of professional historiography as an aspiration).

<sup>72</sup> Powell, *supra* note 71, at 661. According to Powell, a discourse that is free from the “perversions of law and history arguably would be a more rational and more honest discussion.” *Id.* But “[w]e do not live . . . in a world where this will happen. No matter how often constitutional scholars deny the relevance of history for interpretation, and no matter how often historians bemoan the distortions of ‘law office history,’ advocates and judges will continue to invoke the past.” *Id.*; see also Flaherty, *supra* note 67, at 524 (“Lawyers, judges, and . . . legal academics regularly turn to history when talking about the Constitution, and not merely as a rhetorical trope.”).

<sup>73</sup> See generally Melton, *supra* note 69, at 384 (acknowledging the “sad truth” of the

lawyers and judges to meet the standards of academic historians and produce professional-quality historiography[.]”<sup>74</sup> some commentators argue they should “strive to approximate these standards as an aspiration.”<sup>75</sup> As the Honorable Judge Landau stated, those “who turn to history must commit themselves to doing it right.”<sup>76</sup>

What are these standards that we should all aspire to? Scholars have attempted to elicit a workable methodology drawing from a number of different sources and disciplines.<sup>77</sup> For example, Matthew Festa has suggested using evidentiary rules to evaluate how historical claims may be asserted with a “minimum level of reliability,” “without doing violence to the professional standards of historians.”<sup>78</sup> He also explained that despite the duty of zealous advocacy, “lawyers are constrained by certain ethical

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“increasing mass” of legal history that is appearing in scholarship, legal briefs, and case law with little to no understanding of how to properly conduct sound historical research); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 192 (1999) (noting that recent literature illustrates the marked turn toward history that seems “so conspicuous a feature” of contemporary legal scholarship); Wendie Ellen Schneider, Note, *Past Imperfect*, 110 YALE L.J. 1531, 1535 (2001) (“The ‘turn to history’ in American jurisprudence has created an increase in the number of prominent cases employing historical arguments.”); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 487–88 (2002) (describing the “turn to history” by American constitutional scholars as a hallmark of modern legal scholarship).

<sup>74</sup> Festa, *supra* note 67, at 537.

<sup>75</sup> *Id.*

<sup>76</sup> Jack L. Landau, *A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451, 486 (2004).

<sup>77</sup> The difficulty in producing a single workable methodology for producing sound historical research is because historians themselves “do not conceive of themselves as having a single, common procedure for viewing the past (or even a common goal).” Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the ‘Pseudo-Historian’ Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 857 (2008). Indeed, the idea that there is any established, fool-proof methodology to which all historians subscribe to is a reductionist fallacy. For example, one respected treatise describing historical methods describes the historian’s task as “to choose *reliable* sources, to read them *reliably*, and to put them together in ways that provide *reliable* narratives about the past.” MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS 2 (2001). Historian Thomas Haskell claims that a professional historian’s goal (or ideal) is to achieve an objective historical interpretation—not neutral, but an “undeniably ascetic capacity to achieve some distance” from one’s own beliefs. THOMAS L. HASKELL, OBJECTIVITY IS NOT NEUTRALITY 148–49 (1998). In contrast, historian Peter Novick claims that historical objectivity is a myth and is not only “essentially contested, but essentially confused.” PETER NOVICK, THAT NOBEL DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION 3–5, 6 (1988).

<sup>78</sup> Festa, *supra* note 67, at 485.

standards that require their work product to meet a minimum threshold of truth and reliability.”<sup>79</sup> Thus, lawyers cannot “distort the evidentiary record,” or “ignore evidence that is damaging to his client’s position.”<sup>80</sup>

Other scholars have turned to case law for guidance in assessing how to appropriately “do history.” Wendie Schneider proffered the use of the “objective historian” standard that was articulated by Justice Gray in the infamous libel case brought by David Irving, a British historian and Holocaust denier.<sup>81</sup> Schneider explained that while Justice Gray did not explicitly formulate a test for an “objective historian,” one can nonetheless “distill a code of conduct” from his criticisms of Irving:

- (1) She must treat sources with appropriate reservations;
- (2) She must not dismiss counterevidence without scholarly consideration;
- (3) She must be even-handed in her treatment of evidence and eschew “cherry-picking”;
- (4) She must clearly indicate any speculation;
- (5) She must not mistranslate documents or mislead by omitting parts of documents;
- (6) She must weigh the authenticity of all accounts, not merely those that contradict her favored view; and
- (7) She must take the motives of historical actors into consideration.<sup>82</sup>

Another viewpoint was expressed by H. Jefferson Powell who set forth fourteen rules as guidelines to make a lawyers’ “use of history as intellectually responsible as possible.”<sup>83</sup> Powell’s list culminates with the powerful reminder that history is above all an interpretive enterprise, not an “unarguable fiat from the past.”<sup>84</sup> This is because we cannot assume that by relying on “historical evidence,” we are precluding the importation of our own “values, preferences, individual viewpoints, and subjective and societal blindness and prejudice.”<sup>85</sup> Failure to recognize this only grants credence to “historicized myths.”<sup>86</sup>

<sup>79</sup> *Id.* at 524.

<sup>80</sup> *Id.* (citing MODEL RULES OF PROF’L CONDUCT rs. 3.1, 3.3 (AM. BAR ASS’N 1998)).

<sup>81</sup> Schneider, *supra* note 73, at 1532, 1534–35.

<sup>82</sup> *Id.* at 1534–35 (citations omitted).

<sup>83</sup> Powell, *supra* note 71, at 661, 662–91.

<sup>84</sup> *Id.* at 691.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



Judge Burns writes a legal history that is supported by sources that are not only questionable, but lack credibility. One does not arrive at these conclusions lightly—hence the need to illustrate at length the numerous standards and guidelines that students, legal practitioners, jurists, and scholars can and should employ in the responsible use of history. As described below, it does not matter which standard is employed to evaluate Judge Burns’ article (or other articles of a similar ilk) because the result is the same: when you objectively fail to meet these professional standards, some of your credibility is lost, and any position asserted may be undermined.

*A. Sweating the Small Stuff: Why Proper Citation to Credible, Verifiable Sources Is Important*

As explained above in Part II, students are taught how to find and critically evaluate relevant legal authority. Part of that “critical evaluation” requires a student to assess the credibility of a source. After a source is evaluated, a student will give proper attribution using conventional citation rules. “Citations in all disciplines are critical to the work of scholarship . . . . These issues are especially important in legal scholarship, where law reviews and judicial opinions are known for their exhaustive use of citations.”<sup>87</sup>

While there are several functions for a citation, as explained by Daniel Baker, typically an author cites a particular source because: 1) it will offer support for the author’s statements, 2) the citation will help the reader locate the same sources that were used by the author, and 3) it establishes the authority of the sources upon which the writer relied.<sup>88</sup> The authoritative quality of sources is particularly important to those in the legal field because we place “heightened significance on the creator or publisher of the resource being cited, regardless of the content.”<sup>89</sup> Because legal discourse “is grounded in opinion and interpretation, some sources of particular opinions and interpretations carry more weight and are, therefore, more authoritative than other sources.”<sup>90</sup>

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<sup>87</sup> William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 333 (2006).

<sup>88</sup> See Daniel J. Baker, *A Jester’s Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 361, 364–65 (2012).

<sup>89</sup> *Id.* at 365 (citing Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935 (2008)).

<sup>90</sup> *Id.* at 366.

As such, there is “a crucial connection between legal argument and the grounding upon which it rests.”<sup>91</sup> Accordingly, “legal researchers have traditionally looked for information that is more than just informative; they have looked for information that is unquestionably authoritative.”<sup>92</sup> Finally, as explained by Frederick Schauer, “[a] citation to a particular source is not only a statement by the citer that this is a good source but also a statement that sources of this type are legitimate.”<sup>93</sup> The very act of citing a source “is a practice, and thus an institution, and consequently every citation to a particular source legitimizes the institution of using sources of that type.”<sup>94</sup>

The danger of citation, therefore, is the potential legitimization of unreliable or noncredible sources. More troubling, however, is that another layer of authoritativeness is implicitly inherited to the citation because of the author's stature. As discussed below, not only does Judge Burns' article fail to employ the professional standards that are used in the legal community, the article relies on sources that lack probity. By citing them, he cloaks them in a guise of authoritativeness, giving credence and legitimization to otherwise unreliable and noncredible sources.

1. *Why a seventh-grade textbook and HawaiiHistory.Org are not credible sources*

In the article at issue, there are several citations to sources of a dubious nature. For example, relying on any portion of a seventh-grade textbook<sup>95</sup>—even to cite seemingly “basic” facts—is inappropriate for a legal scholarly publication and does not comport with standard research methods employed by students, attorneys, scholars, jurists, or historians.<sup>96</sup> History contained in a textbook that has been watered down for easy consumption for twelve-year-old children is part of the concern. Another

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<sup>91</sup> Kris Franklin, “. . . See Erie.”: *Critical Study of Legal Authority*, 31 U. ARK. LITTLE ROCK L. REV. 109, 111 (2008).

<sup>92</sup> Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 419 (2002).

<sup>93</sup> See Schauer, *supra* note 89, at 1957.

<sup>94</sup> *Id.* at 1957–58; see discussion *infra* Part III.

<sup>95</sup> See Burns, *supra* note 6, at 225 nn.59–60, 226 n.70 (citing NORRIS W. POTTER ET AL., *HISTORY OF THE HAWAIIAN KINGDOM* 122, 127, 129–33 (2003)).

<sup>96</sup> On the publisher's website, Potter's textbook is marketed as follows: “This revised edition of the widely used 7th-grade textbook *History of the Hawaiian Kingdom* is designed to meet [the State of Hawai'i Department of Education] Social Studies Content Standards in a semester-long course.” *History of the Hawaiian Kingdom*, BESS PRESS, <http://www.besspress.com/studies/history-of-the-hawaiian-kingdom> (last visited Apr. 22, 2017).

issue is that history textbooks for children have long been mired in controversy—indeed, textbooks have become a battleground for special-interest groups who pressure publishers to “tell the official truth about the past.”<sup>97</sup> As a result, “commerce plays an important part in deciding which historical truths shall be official.”<sup>98</sup> Using the “objective historian” standard, which necessitates the treatment of sources with “appropriate reservations,” there is little doubt remaining as to the “citability” of this source. Even assuming this seventh-grade textbook could be accepted as a potentially useful secondary source, we are still obliged to assess its value by examining the sources cited in the bibliography. As discussed below in Part III, this source, like so many other Hawai‘i history books, largely relies on a flawed historiography based on biased, outdated, English-only sources.

Another example of a problematic citation to a questionable source comes from the section entitled, “The Relevant History” that begins on page 217 of Judge Burns’ article.<sup>99</sup> The author begins that section as follows:

According to HawaiiHistory.org:

The concept of private property was unknown to ancient Hawaiians, but they did follow a complex system of land division. All land was controlled ultimately by the highest chief or king who held it in trust for the whole population. Who supervised these lands was designated by the king based on rank and standing . . .<sup>100</sup>

The textual citation to HawaiiHistory.org draws the reader’s attention to the source, as it is not buried in a footnote, which is typical for legal scholarship.<sup>101</sup> The placement of this source directly in the text, whether it was intentional or not, is a tacit recognition by Judge Burns that this is a credible secondary source.<sup>102</sup>

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<sup>97</sup> Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 973 (2009) (quoting DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 40 (2003)).

<sup>98</sup> *Id.* (quoting TYACK, *supra* note 97, at 59-60).

<sup>99</sup> See Burns, *supra* note 6, at 217.

<sup>100</sup> *Id.* at 217 n.21 (citing *Ahupua‘a*, HAWAIIHISTORY.ORG, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=299> (last visited Dec. 2, 2015)).

<sup>101</sup> See *id.*

<sup>102</sup> Admittedly, Judge Burns cites to another source in his footnote. See Burns, *supra* note 6, at 217 n.21 (citing Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 2, at 9). As described in Section II.A.1 below, the deliberate choice of citing HawaiiHistory.org within the main body of an article results in the privileging of some sources over other sources, whether it was intentional, or not.

As a preliminary matter, the practice of citing online sources is not at issue here. Ellie Margolis stated, “[t]he time for lamenting the changes wrought by the Internet and resisting the use of electronic materials has passed.”<sup>103</sup> Indeed, a basic search for the use of online sources in Westlaw or Lexis demonstrates that judicial opinions, legal briefs, and law review articles are “replete with citations” to various online sources.<sup>104</sup> From Wikipedia to government websites, from blogs to state regulations—the prolific use of online sources has been well documented.<sup>105</sup> That does not mean that this practice is without controversy.<sup>106</sup> Margolis recognized that in a court proceeding, the chief concern of the use of Internet sources is how to determine whether a website is a source “whose accuracy cannot reasonably be questioned.”<sup>107</sup> This is because “anyone, for a small amount of money, can create a website and publish information without any oversight . . . .”<sup>108</sup> Thus, while government websites are generally perceived to be reliable, private corporate websites generate more controversy.<sup>109</sup> Wikipedia is an example of an online source that is considered to be highly controversial.<sup>110</sup> This is because “anyone can edit a Wikipedia entry at any time, its content can change rapidly, and the court cannot necessarily ascertain the accuracy of the requested information.”<sup>111</sup> It is readily acknowledged that Wikipedia, and by extension, similar types of sources, should not be cited—especially in cases dealing with complex or hotly contested subjects.<sup>112</sup> The history surrounding Native Hawaiians would undoubtedly be described as a “complex” and “hotly contested subject.” Thus, sources like Wikipedia should not be cited as an authoritative source.

While HawaiiHistory.org is arguably not Wikipedia, it certainly bears some striking similarities. First, one could easily be fooled by the seemingly nonpartisan website name: HawaiiHistory.org. An Internet user is likely to assume that the use of “.org,” means that the domain name

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<sup>103</sup> Ellie Margolis, *It's Time to Embrace the New—Untangling the Uses of Electronic Sources in Legal Writing*, 23 ALB. L.J. SCI. & TECH. 191, 194 (2013).

<sup>104</sup> *See id.* at 192.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 200 (quoting FED. R. EVID. 201(b)).

<sup>108</sup> *Id.* at 203.

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *Id.* (citations omitted).

<sup>112</sup> *See id.*; Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 28–29 (2009) (explaining why Wikipedia should not be relied upon, *inter alia*, as the basis for a court's holding or taking judicial notice of adjudicative facts).

represents a non-profit organization.<sup>113</sup> In this case, HawaiiHistory.org “is a part of Hukilau Network . . . [and its] sites were conceived and developed by Info Grafik Inc., a Honolulu design and storytelling company.”<sup>114</sup> Info Grafik describes itself as “a specialized consulting firm that provides Hawai‘i-style brand image development and management for large and small businesses.”<sup>115</sup> The company “helps clients shape the perception of their organizations and products by developing comprehensive communications strategies and marketing identity systems.”<sup>116</sup> The company serves a “range of corporate clients from the Hawai‘i Top 250 to a range of offshore companies working in Hawai‘i.”<sup>117</sup> Listed under a section called “Community Service,” Info Grafik provides the following information: “In 2004, after 5 years of work, Info Grafik published HawaiiHistory.org, the largest and most comprehensive site of its kind on the web. Info Grafik provided 100% of the funding and did the research, design, writing and application development for the site.”<sup>118</sup> In short, HawaiiHistory.org was produced by a marketing company that specializes in storytelling for high-profile corporate clients. Arguably, storytelling is appropriate insofar the audience is largely comprised of, as implicitly noted on the website, school-aged students who need easily digestible stories to connect with history.<sup>119</sup>

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<sup>113</sup> Ariane C. Strombom, *Internet Outlaws: Knowingly Placing Ads on Parked Domain Names Invokes Contributory Trademark Liability*, 17 MARQ. INTELL. PROP. L. REV. 319, 324 (2013) (“[A]n Internet user is likely to type in the domain name by making assumptions, like that ‘.com’ means the domain name is for a business, and ‘.org’ means a domain name is for a nonprofit organization.”). There is no prohibition, however, for the use of the .org designation by a for-profit business. See, e.g., Ariz. Comm. on the Rules of Prof’l Conduct, Ethics Op. 11-04 (2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=717> (modifying Ethics Opinion 01-05 in light of recent evidence that anyone may register a website address that contains the suffix “.org,” without requiring that the website is or will be used by a nonprofit entity).

<sup>114</sup> *About HawaiiHistory.org & the Hukilau Network*, INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=44> (last visited Apr. 22, 2017).

<sup>115</sup> *History of Info Grafik*, INFO GRAFIK, INC., <http://www.infografik.com/about/about.html> (last visited Apr. 22, 2017).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *Village of Kaawaloa, On Kealakekua Bay*, INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.image&FileName=img63.jpg> (last visited Apr. 22, 2017) (giving permission to students to use photos for school reports).

But this is not the most troubling aspect of the use of HawaiiHistory.org as the “headlined” source in Judge Burns’ article for Hawai’i’s “Relevant History.” According to HawaiiHistory.org’s website, it states that it provides information about 3,000 events from 1778 to 2002, and over 150 articles on various topics, such as the Hawaiian Sovereignty movement, or cosmology.<sup>120</sup> HawaiiHistory.org is touted as a free-content source that is based on a model of collaborative contribution from volunteers—a model similarly employed by Wikipedia.<sup>121</sup> Articles are anonymously written (*i.e.*, no authors are listed on individual articles or submissions), and there are no footnotes, endnotes, or citations in any of the articles—at the end of some of the articles, however, a list is provided directing the reader to “Sites for further information.”<sup>122</sup> If one is persistent and sifts through the various links, on occasion, a bibliographic source list for some of the topics can be found.<sup>123</sup> Although the site purportedly states research was “supervised” by experts,<sup>124</sup> it does not state when or how much of the material listed on the website was “supervised.” Indeed, none of the pages are dated, and it does not state if a particular volunteer contribution was vetted by an “expert.”

A discussion of some of the criticisms leveled at Wikipedia is worth mentioning due to the problematic similarities that are seen in HawaiiHistory.org. Wikipedia is widely criticized by legal scholars and

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<sup>120</sup> See *About HawaiiHistory.org & the Hukilau Network*, *supra* note 114.

<sup>121</sup> See *Wikipedia:About*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:About> (last visited Apr. 22, 2017) (“Wikipedia is a multilingual, web-based, free-content encyclopedia . . . written collaboratively by largely anonymous volunteers who write without pay.”). On HawaiiHistory.org, some articles appear to be “sponsored by” corporate entities. For example, the editorial feature about “Chinatown” is sponsored by Hawaii National Bank. See *Library*, INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=294> (last visited Apr. 22, 2017).

<sup>122</sup> See, e.g., *Peopling of the Pacific*, INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=317> (last visited Apr. 22, 2017).

<sup>123</sup> For example, I could find a source list for the topic on “Voyaging,” but I could not find a source list for “Warfare and Weapons.” Compare *Voyaging Sources*, INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=583> (last visited Apr. 22, 2017), with *Warfare and Weapons*, INFO GRAFIK, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=284> (last visited Apr. 22, 2017).

<sup>124</sup> The homepage, under a section entitled “The Hukilau Network,” states that the work was “supervised and checked by Robert C. Schmitt, the former state statistician and Carol Silva, the archivist, writer and teacher.” Under a section entitled “Mahalo to:” it acknowledges Carol Silva “for her guidance” and Robert Schmitt “for helping us keep the facts straight.” See INFO GRAFIK, INC., <http://www.hawaiihistory.org/index.cfm?> (last visited Apr. 22, 2017).

courts for its lack of “accuracy, credibility, quality, reliability, trustworthiness, veracity, etc.”<sup>125</sup> One of the loudest complaints relates to Wikipedia’s lack of probity—*i.e.*, its failure to have an “uncompromising adherence to the highest principles and ideals” or “unimpeachable integrity.”<sup>126</sup> As explained by Daniel Baker, “[a] source is authoritative not merely because of who produced it, but because that entity, whether an individual or an institution, has taken responsibility for it.”<sup>127</sup> What makes a source “authoritative” is “its reputation . . . for strong scholarship, sound judgment, and disciplined editorial review.”<sup>128</sup> For HawaiiHistory.org, the lack of probity should be evident to most students: articles are “authorless,” volunteer contributions are welcomed from the public but there are no clear editorial guidelines for contributions (if any), there is no clear indication when articles have been “published” or “revised,” bibliographic entries are only sporadically available, and finally, the site is produced and supported by a marketing company that specializes in storytelling for high profile corporate clients.

HawaiiHistory.org is a community resource that was likely intended to be used primarily by the casual researcher, or school-aged students—not legal scholars or courts. If a fourth-grade student relies on an entry on HawaiiHistory.org that contains false or incorrect information, the result is at worse, a bad grade. If a party asks the court to take judicial notice of a particular adjudicative fact<sup>129</sup> from HawaiiHistory.org that is false or incorrect, the results could be disastrous.

Some might argue that I am guilty of over-sensationalizing two examples of what were likely the result of an “accidental oversight”—an admittedly embarrassing mistake that resulted in the citation of a seventh-grade textbook and a website that was arguably geared toward seventh-graders. Unfortunately, there were several other “oversights” in this article. For example, a cultural foundation affiliated with the luxury golf-course community Hoakalei was cited as a source for a primary law (the Kuleana Act)—notably, it was not a digitized image from the original print source

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<sup>125</sup> Baker, *supra* note 88, at 374 (citations omitted) (summarizing commentators’ concerns regarding Wikipedia’s problematic “dimensions of information quality”).

<sup>126</sup> *Id.* at 374–75 (quoting definition of “probity” from WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1986)).

<sup>127</sup> *Id.* at 377 (citations omitted).

<sup>128</sup> *Id.* at 378 (alteration in original) (quoting Stacy Schiff, *Know it All: Can Wikipedia Conquer Expertise?*, NEW YORKER, July 31, 2006, at 42).

<sup>129</sup> See Peoples, *supra* note 112, at 12–19, 28–29 (providing examples of the dangers when a court takes judicial notice of information obtained from Wikipedia entries).

which would demonstrate some indicia of reliability.<sup>130</sup> It was a typewritten version of the Kuleana Act which could easily contain errors in transcription, or worse, could be selectively edited or rewritten.<sup>131</sup> The article also repeatedly utilizes questionable secondary sources to advance controversial “facts” and legal theories,<sup>132</sup> it misconstrues sources,<sup>133</sup> or fails to properly attribute sources altogether.<sup>134</sup>

As described more thoroughly below, what may originally be dismissed as a few “accidental oversights” evolves into a pernicious pattern that not only demonstrates inadequate research, but borders on scholarly negligence.

## 2. *Why extensively quoting outdated and/or facially biased sources is not “relevant history”—it is unsophisticated advocacy*

As discussed in Section II.A.1 above, the article contains some obvious “oversights.” Some of these oversights, however, could be misconstrued and lead to some unfortunate results. For example, the article contains a lengthy quoted passage (353 words)<sup>135</sup> from a 1993 National Parks Survey<sup>136</sup> relating to the cultural history of three historical sites on Hawai'i

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<sup>130</sup> Compare Burns, *supra* note 6, at 242 n.142 (citing *The Kuleana Act of 1850*, HOAKALEI CULTURAL FOUND., <http://www.hoakaleifoundation.org/documents/kuleana-act-1850> (last visited Apr. 22, 2017)), with Act of Aug. 6, 1850, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges, reprinted in PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE HOUSE OF NOBLES AND REPRESENTATIVES ON THE 21ST OF JUNE, A.D. 1850, at 202–04 (Honolulu, Henry M. Whitney, Gov't Press 1850). The latter citation provides a citation to the primary source document.

<sup>131</sup> See *supra* notes 103–11 and accompanying text.

<sup>132</sup> For example, Judge Burns relied on non-legal secondary sources for purposes of defining “sovereignty”—a term with obvious legal import. See, e.g., Burns, *supra* note 6, at 236 n.116 (first citing Daniel Philpott, *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/sovereignty/>; and then citing Daniel Philpott, *Sovereignty*, in THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 561 (George Klosko ed. 2011)).

<sup>133</sup> See e.g., Burns, *supra* note 6, at 236 n.117 (using *Black's Law Dictionary* as a source to define “authority” but quoting language that does not reflect the correct legal definition of the term); *id.* at 236 n.116 (citing the *Stanford Encyclopedia of Philosophy* to selectively define “sovereignty”). The *Stanford Encyclopedia of Philosophy* is cited as defining “sovereignty” as having “supreme authority within a territory.” See Philpott, *supra* note 132. The website explains that its “meanings have varied across history.” *Id.* It also states that scholars have doubted whether a “stable, essential notion of sovereignty exists.” *Id.*

<sup>134</sup> See Burns, *supra* note 6, at 241 n.139 (citing a collection of essays as fact and without designating the author or essay title); see also Section II.A.2 *infra*.

<sup>135</sup> See *id.* at 217–18.

<sup>136</sup> See *id.* at 218 n.22 (citing LINDA WEDEL GREENE, U.S. DEP'T OF INTERIOR, NAT'L



island. This rather outdated survey was relied upon to purportedly describe the history of land tenure, government, and hierarchical structure of Hawaiian society.<sup>137</sup> Within this quoted section, there are several embedded “quoted passages.”<sup>138</sup> One such passage characterized the distribution of lands by Native Hawaiian leaders (ali‘i) thusly: “Often this re-distribution of lands was ‘carried out with great severity.’”<sup>139</sup> Curiously, Judge Burns’ article properly gave attribution to the other quoted authors in this section—however, this strongly-worded characterization of land tenure by ali‘i lacked a source for attribution. The omitted citation for this particular quoted passage is Sanford B. Dole’s, *Evolution of Hawaiian Land Tenures*.<sup>140</sup>

A detail like this could easily be overlooked by most readers. But the potential impact lies directly in its subtlety—this passage could lead a reader to assume that this somewhat negative characterization of Native Hawaiian land tenure was *authored* by a government agency, the National Park Service—not the infamous political figure Sanford Dole. In a popular book authored by controversial historian Lawrence Fuchs, the 1893 overthrow of the Hawaiian monarchy was described as being “dignified through the support of one of the great names in Hawaiian history, Sanford Ballard Dole” who “represented the best of the haole missionary tradition in

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PARK SERV., A CULTURAL HISTORY OF THREE TRADITIONAL HAWAIIAN SITES ON THE WEST COAST OF HAWAII ISLAND (1993)).

<sup>137</sup> See *id.* at 217–18. Why this source was so extensively quoted by Judge Burns is baffling. The preface to this report states that the “primary purpose of this study was to ascertain the appearance of Pu‘ukoholā Heiau and any structures that rested on its platform during the late eighteenth and early nineteenth centuries.” GREENE, *supra* note 136, at v. In terms of the sources relied upon in this report, “[s]pecific emphasis was put on examining journals, logbooks, photographs, drawings, maps, and other material in the Eastern United States that had not been previously researched.” *Id.* In addition, “[a] variety of published German, French, and Spanish sources were translated and studied” as part of their report. *Id.* This is ironic given a review of the bibliography demonstrates a reliance on English-only sources and a small smattering of translated Hawaiian texts—a glaring omission from most histories about Native Hawaiians that is discussed below in Part III.

<sup>138</sup> See Burns, *supra* note 6, at 217–18 (first citing Stephanie Seto Levin, *The Overthrow of the Kapu System in Hawai‘i*, 77 J. POLYNESIAN SOC’Y 402, 420 (1968); and then citing WILLIAM R. BROUGHTON, A VOYAGE OF DISCOVERY TO THE NORTH PACIFIC OCEAN 37 (reprint ed. 1967) (1798)). Ironically, it would appear that the National Park Service report incorrectly attributed a quote to Broughton—indeed, the quoted material comes from a different source. See GREENE, *supra* note 135, at 125 n.25 (quoting HIRAM BINGHAM, A RESIDENCE OF TWENTY-ONE YEARS IN THE SANDWICH ISLANDS 49 (2d ed., Hartford, Hezekiah Huntington 1848)).

<sup>139</sup> See Burns, *supra* note 6, at 218 (quoting GREENE, *supra* note 136, at 126).

<sup>140</sup> Sanford B. Dole, *Evolution of Hawaiian Land Tenures*, PAPERS OF THE HAWAIIAN HISTORICAL SOCIETY NO. 3, 1–18 (1892).

Hawaii.”<sup>141</sup> According to Fuchs, Dole sought a “constitution that would protect haole rights and privileges.”<sup>142</sup> As such, Dole’s ideas about land tenure and Hawai’i politics would undoubtedly be representative of a particular viewpoint.<sup>143</sup>

Indeed, in that same passage that is quoted in Judge Burns’ article, Dole describes land-tenure in Hawai’i as “analogous to that of the barons of European feudalism.”<sup>144</sup> Moreover, that the “despotic control over land developed in the direction of greater severity rather than toward any recognition of the subjects’ rights, and it finally became an established custom . . . to re-distribute the lands of the realm.”<sup>145</sup> Dole characterizes this type of land tenure as “disastrous and destructive to all popular rights in land.”<sup>146</sup>

Citations not only establish the authoritativeness of the position that the author is asserting, they also directly relate to an author’s credibility. The failure to properly attribute a direct quotation to Dole is misleading—it fails to acknowledge that the article’s “Relevant Facts” partly originate from and are supported by a controversial figure in history. This type of omission, while potentially the result of yet another “accidental oversight,” is part of what emerges as a repeated pattern of scholarly negligence.

For example, another one-sided source proffered in support of this “Relevant History” is contained on pages 227 through 228, wherein Judge Burns extensively quotes a total of 498 words from W.D. Alexander’s book, *History of Later Years of the Hawaiian Monarchy and the Revolution of 1893*.<sup>147</sup> This secondary source is used to describe the “main facts” of a case that came from, *inter alia*, a reported decision of the Hawai’i Supreme Court.<sup>148</sup> It is unclear why the reported decision, and other published court

<sup>141</sup> LAWRENCE E. FUCHS, HAWAII PONO “HAWAII THE EXCELLENT”: AN ETHNIC AND POLITICAL HISTORY 31 (1961); see, e.g., Lawrence V. Cott, “. . . *Bad Scholar* . . . *Poseur* . . . *Absurd* . . . *Sloppy Research, Writing* . . .”, 74 PARADISE PAC., Sept. 1, 1962, at 34 (reviewing the debate over Fuch’s controversial best-selling history of Hawai’i).

<sup>142</sup> See FUCHS, *supra* note 141, at 31.

<sup>143</sup> As ‘Ōiwi scholar Noenoe Silva explained, to say that Sanford Dole’s written works “are biased would be an understatement.” See SILVA, *supra* note 23, at 165.

<sup>144</sup> See Dole, *supra* note 140, at 5.

<sup>145</sup> *Id.* at 6.

<sup>146</sup> *Id.*

<sup>147</sup> See Burns, *supra* note 6, at 227–28 (quoting W.D. ALEXANDER, HISTORY OF LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893, at 19–22 (Honolulu, Hawaiian Gazette Co. 1896)).

<sup>148</sup> See ALEXANDER, *supra* note 147, at 19 (“The facts of this case were stated in the affidavit of Aki, published May 31st, 1887, and those of Wong Leong, J.S. Walker and Nahora Hipa, published June 28th, 1887, as well as in the decision of Judge Preston in the

documents (read, the primary sources) relating to the underlying case were not relied upon by Judge Burns. Arguably, the lurid language used in Alexander's book makes for easier reading—for example, the quoted passage refers to a witness in the case as a "palace parasite."<sup>149</sup> This style of writing, however, perhaps should have signaled possible underlying issues of probity.

Upon further examination of W.D. Alexander's<sup>150</sup> book, it is clear that this too is a one-sided source. Part I is entitled, "the Decadence of the Hawaiian Monarchy."<sup>151</sup> Chapter 1 commences with a so-called "history" of the Hawaiian Monarchy with the following statement:

It is true that the germs of many of the evils of Kalakaua's reign may be traced to the reign of Kamehameha V . . . Under him the 'recrudescence' of heathenism commenced, as evinced by the Pagan orgies at the funeral of his sister, Victoria Kamamalu, in June 1866, and by his encouragement of the lascivious hulahula dancers and of the pernicious class of Kahuna or sorcerers. Closely connected with this reaction was a growing jealousy and hatred of foreigners.<sup>152</sup>

Alexander admits in the preface of his book that he does not "profess to be a neutral," but has "honestly striven" to "state the facts as nearly as possible."<sup>153</sup> The preface further explains<sup>154</sup> that this book was published on behalf of the *Hawaiian Gazette*—which, as described further below in Section III.E., was a pro-Annexation oligarchy newspaper. In advertisements announcing the creation and future publication of this book in 1894, it stated that this "accurate" and "impartial" history of the 1893

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case of Loo Ngawk *et al.*, executors of the will of T. Aki vs. A. J. Cartwright *et al.*, trustees of the King (Haw. Rep. Vol. vii., p 401).").

<sup>149</sup> *Id.*

<sup>150</sup> William DeWitt Alexander was a prolific writer and historian during the late nineteenth-century. See, e.g., W.D. ALEXANDER & ALATAU T. ATKINSON, AN HISTORICAL SKETCH OF EDUCATION IN THE HAWAIIAN ISLANDS (Honolulu, Daily Bulletin Steam Print 1888); W.D. ALEXANDER, A SHORT SYNOPSIS OF THE MOST ESSENTIAL POINTS IN HAWAIIAN GRAMMAR: FOR THE USE OF THE PUPILS OF OAHU COLLEGE (Honolulu, H.M. Whitney 1864). He was the corresponding secretary for the Hawaiian Historical Society, and was appointed as a member of the commission responsible for creating and establishing the Hawai'i State Archives. See HAW. HIST. SOC'Y, FIRST ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY 2, 4 (Honolulu, Hawaiian Gazette Co. 1893).

<sup>151</sup> See *Contents*, in ALEXANDER, *supra* note 147.

<sup>152</sup> ALEXANDER, *supra* note 147, at 1.

<sup>153</sup> *Preface*, in ALEXANDER, *supra* note 147.

<sup>154</sup> *Id.*

revolution was "DEDICATED BY SPECIAL PERMISSION TO THE Provisional Government."<sup>155</sup>

As described in Part II above, and bears repeating here: (1) a scholar is urged towards an "inquiry devoted to the discovery of truth"; (2) students and practitioners are expected to know how to locate relevant legal authority, and how to critically evaluate it; (3) practitioners must be mindful to not distort the evidentiary record, or ignore evidence that is damaging to his client's position; (4) an "objective historian" must, *inter alia*, treat sources with appropriate reservations, must weigh the authenticity of accounts, and consider the motives of actors.

In short, it is evident that Judge Burns' article fails to meet any of these professional standards. The article utilizes watered down "histories" that were meant for children, fails to give proper attribution for quoted material, misconstrues cited material, fails to rely on primary legal sources when appropriate, relies on one-sided secondary sources, and misleads the reader with confusing citations. In his zeal to prove his point, he eschewed the very principles that we all abide by and crafted a "history" supported by a bevy of dubious sources. The result is unsophisticated advocacy that is undermined by numerous, and at times, embarrassing mistakes. Some may argue that I am being too formalistic—that such mistakes are symptomatic of being "human" and we should look at the merits of Judge Burns' arguments.

Ironically, Judge Burns criticized Professor Jon Van Dyke's reliance upon five "documents" to support a particular argument in his book—specifically, Judge Burns asserted that "these documents, considered separately or together, do not validate Professor Van Dyke's opinions."<sup>156</sup> The five documents at issue were: the 1898 Newlands Resolution, the 1900 Organic Act, the 1993 Apology Resolution, a Hawai'i Attorney General's

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<sup>155</sup> Finally, Alexander acknowledges that "much assistance has been derived from a paper by the Rev. S.E. Bishop . . ." *Id.* To understand how this impacted Alexander's work, one must first recognize that the Reverend Sereno Edwards Bishop considered Native Hawaiian culture and language to be sources of "idolatry" and "unspeakable foulness." Rev. S.E. Bishop, Address to Honolulu Social Science Association: Why Are the Hawaiians Dying Out?: Or Elements of Disability for Survival Among the Hawaiian People 14 (Nov. 1888) (transcript available in the University of California Los Angeles Library). He also asserted that Hawaiians were dying as a race because despite sixty-eight years of Christianity, religion had failed to "lift the Hawaiian people out of the mire of impure living." *Id.* at 17. Bishop claimed that hula had "corrupted them with its leprosy" and the "Kahunas [priests] st[oo]d by to thrust [Hawaiians] down into earlier graves." Sereno Edwards Bishop, *Decrease of Native Hawaiians*, FRIEND, Apr. 1891, at 25.

<sup>156</sup> See Burns, *supra* note 6, at 249.

opinion, and an article published in the Wall Street Journal.<sup>157</sup> Comparatively speaking, Judge Burns' citation of a seventh-grade textbook, HawaiiHistory.org, an outdated National Park Study, and a string of one-sided secondary sources, seem trite in comparison. When one produces a "history" based on such sources, it is not about being formalistic, it is about credibility—or the lack thereof.

Sadly, these are just some of the glaring "oversights" contained in this article. As discussed below, there are many others. Judge Burns, however, is not alone in making these mistakes—many others have faltered as well.

### III. PAST IMPERFECT: MAKING HISTORY WITHOUT HAWAIIANS

He loa ka 'imina o ke ala o Hawai'i 'imi loa

Long is the search for the way of Hawai'i's thinkers<sup>158</sup>

Judge Burns' article is representative of a larger systemic problem—many wish to write about Hawai'i's legal history, but few give much thought to the veracity or authoritativeness of the underlying historical sources that they use. In developing my critique of this hegemonic methodology, I have taken a multi-disciplinary approach, drawing upon the insights developed by scholars of critical outsider jurisprudence, indigenous studies, critical archival studies, and historiography, including, *inter alia*: Subaltern Studies,<sup>159</sup> the Archival Turn,<sup>160</sup> Law as Archive and Counter-

<sup>157</sup> *Id.* at 248–49.

<sup>158</sup> Samuel H. Elbert, *Preface*, in MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN-ENGLISH DICTIONARY ix (3d ed. 1965) (explaining the frustrating realization that despite the many years of dedicated work, it is impossible to record Hawaiian completely, with its rich and varied background, its many idioms undescribed, and its sophisticated use of figurative language).

<sup>159</sup> The term "Subaltern Studies" references a form of historiography that emerged in South Asia and is based on "giving voice to those who have been left outside of historical narratives produced by colonial or national writers." Ratna Kapur, *Law and the Sexual Subaltern: A Comparative Perspective*, 48 CLEV. ST. L. REV. 15, 16 (2000) (first citing SUMIT SARKAR, *WRITING SOCIAL HISTORY* 82–108 (1997); and then citing Ranajit Guha, *On Some Aspects of the Historiography of Colonial India*, in SUBALTERN STUDIES I (Ranajit Guha ed., 1982)); see also Kenneth M. Casebeer, *Subaltern Voices in the Trail of Tears: Cognition and Resistance of the Cherokee Nation to Removal in Building American Empire*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2014) (critiquing the "curious" lack of inclusion of Cherokee voice in two recent publications describing the history of removal of Eastern Native nations); Renisa Mawani, *Law's Archive*, 8 ANN. REV. L. & SOC. SCI. 337, 344 (2012) ("[H]istorians and scholars in colonial history and beyond continue their search for marginal, oppressed, and subjugated voices as subversive figures and as transformative agents in and of history.").

Archival Sense,<sup>161</sup> Reading Against the Grain,<sup>162</sup> Kanaka 'Ōiwi Critical Race Theory,<sup>163</sup> Critical Outsider Jurisprudence,<sup>164</sup> Collective Memory and Counter-memory,<sup>165</sup> and Counter-storytelling,<sup>166</sup> to name just a few.

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<sup>160</sup> Anthropologist Ann Stoler, often credited with coining the term, "Archival Turn," advocates the repositioning of the archive as a mere site of knowledge where research commences, but rather as an object of investigation. See ANN LAURA STOLER, *ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE* 20 (2009).

<sup>161</sup> See discussion *infra* Section III.A.; Stewart Motha & Honni van Rijswijk, *Introduction: Developing a Counter-Archival Sense*, in LAW, MEMORY, VIOLENCE: UNCOVERING THE COUNTER-ARCHIVE 2 (Stewart Motha & Honni van Rijswijk eds., 2016) (urging legal scholars to refuse to take law's archive for granted, to interrogate the teleological narratives that law produces, and to locate the multiple forms, sites, and practices that manifest law's counter-archive).

<sup>162</sup> "Reading against the grain," long used in critical historiography, is often employed as a subversive approach to reading official historical documents. See Mawani, *supra* note 159, at 346; STOLER, *supra* note 160, at 46–47. This methodology is used to fill out the silences inherent to the archives to perhaps draw out new insights and understandings from the archival record.

<sup>163</sup> Kanaka 'Ōiwi Critical Race Theory ('ŌiwiCrit) is an emerging analytical framework currently being used in the context of Native Hawaiian higher education. Erin Kahunawaika'ala Wright & Brandi Jean Nālani Balutski, *Ka 'Ikena a ka Hawai'i: Toward a Kanaka 'Ōiwi Critical Race Theory*, in KANAKA 'ŌIWI METHODOLOGIES: MO'OLELO AND METAPHOR 87 (Katrina-Ann R. Kapā'anaokalāokeola Nākoa Oliveira & Erin Kahunawaika'ala Wright eds., 2016). Influenced by Critical Race Theory and Tribal Critical Race Theory, 'ŌiwiCrit is a developing methodological tool employed by Native Hawaiians to "name the oppression, whether structural, normative, or overt, while helping [to] reframe the issues and build equitable . . . environments." *Id.*

<sup>164</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987) (advocating to look "to the bottom" and adopt the perspective of those most oppressed and subjugated to help define the elements of justice); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322 (1989) (explaining that outsider jurisprudence is "derived from considering stories from the bottom").

<sup>165</sup> Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000) (drawing upon cultural psychology studies to show how "collective memory" is a present-day struggle among competing groups to defend historical injustice); GEORGE LIPSITZ, *TIME PASSAGES: COLLECTIVE MEMORY AND AMERICAN POPULAR CULTURE* 213–14, 227 (1990). Lipsitz frames counter-memory as "a way of remembering and forgetting that starts with the local, the immediate, and the personal . . . [looking] to the past for the hidden histories excluded from dominant narratives . . . [to] reframe and refocus dominant narratives purporting to represent universal experience . . . ." LIPSITZ, *supra*, at 213.

Efforts to reclaim Hawai'i's collective memory is "paramount, because 'framing injustice is about social memory,' and constructing an accurate and compelling collective memory of injustice is a predicate to fashioning just reparative actions in the future." MacKenzie & Sproat, *supra* note 31, at 485. For Native Hawaiians, part of this process involves "refram[ing] significant events in Hawai'i's history to highlight the injustices to

Collectively these concepts have informed my analysis, allowing me to confront the practice of exclusion or marginalization of Native Hawaiian voice in conventional histories—whether told by judges, lawyers, or scholars.

### A. *Law As Archive*

Because much of this article is focused on challenging research methods used by those who seek to write about Native Hawaiians, I start by first deconstructing preconceived notions of what constitutes a “source” and how those sources should be appropriately evaluated. This is because for those who “do history,” many (if not most), will eventually find themselves dealing with “archives.”

Jacques Derrida famously stated, “Nothing is less reliable, nothing is less clear today than the word ‘archive.’”<sup>167</sup> For many, the archive is simply viewed as a repository for historical records and sources—however as noted by some scholars, it is a “dynamic, incomplete, and fiercely disputed site of knowledge production that carries profound implications for how we write history and approach and understand the past.”<sup>168</sup> Indeed, in other disciplines, such as history, philosophy, and literary studies, scholars are focused on what constitutes history, how the past is conceived, and “how it might be written through sources, evidentiary rules of the discipline, and their reinvention.”<sup>169</sup> As described by scholar Renisa Mawani,

[M]any have questioned conventional modes of writing history, highlighting the (im)possibility of recuperating historical and archival texts as “truth” and urging the need to employ critical and literary modes of reading . . . [as such], critics have challenged prevailing views of history’s archive as an objective, credible, and reliable domain of the past and as evidence of “what really happened.” In the wake of the archival turn, history’s archive is newly conceived to be a site of epistemic and political struggle, an approach that

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Native Hawaiians and reconstruct society’s collective memory of those incidents, such as the Māhele process and illegal nature of the 1893 overthrow.” *Id.*

<sup>166</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). In Delgado’s article, he advocates for “outgroups,” those “whose marginality defines the boundaries of the mainstream,” to “shatter complacency and challenge the status quo” by “counter-storytelling,” *i.e.*, telling stories which directly challenge the majority in-group’s “stock stories.” *Id.* at 2412, 2414, 2416, 2430, 2434, 2440.

<sup>167</sup> JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION* 90 (Eric Prenowitz trans., 1996).

<sup>168</sup> Mawani, *supra* note 159, at 339.

<sup>169</sup> *Id.*

questions the integrity of historical evidence and the narrations it makes possible.<sup>170</sup>

Despite the rich dialogue unfolding in other disciplines, legal historians and scholars have not explicitly engaged with “law’s archive.”<sup>171</sup> Admittedly, some legal scholars have reflected on what constitutes a “reliable source,” and have sought alternate forms of legal knowledge—but few have openly challenged their historical methods.<sup>172</sup> “Even fewer have asked whether law has an archive, what constitutes it, how it might be conceptualized, and perhaps most importantly, how such formulations might shape what we think of as law.”<sup>173</sup>

According to Derrida, however, the archive’s connection to law is evident in its etymology: *Arkhe* “names at once the *commencement* and the *commandment*”—it is “where things *commence*” and “where men and gods *command*.”<sup>174</sup> “The key to understanding the relation of archive to law and to legal relations, is to acknowledge that the archive is not somewhere over ‘there’ but rather ‘here,’ now.”<sup>175</sup> Viewed in this light, archives and law are not only interconnected, as asserted by Mawani, the law *is* the archive:

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<sup>170</sup> *Id.* at 340.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* The obvious inadequacies in our historical methods were aptly critiqued by Professor Steven Wilf:

Legal historians, in other words, have been left behind by other historians. Legal historians are borrowers from borrowers. As intellectual magpies traveling from nest to nest, they occasionally bring methodologies borrowed from other areas of scholarship to bear upon their own legal historical enquiries. When was the last time someone borrowed from us? We inherit derivative methodologies, and often remain uncritical of our own historiographic preconceptions. How many legal historians simply follow cases one after another like beads on a rosary until they reach a believable conclusion that this is the past? Much legal historical work is of the headnote tradition—cases simply represent holdings—which, in turn, represent the slow accretion of legal doctrines. In some ways, while we claim the mantle of historians—even if our heads are sometimes insufficiently anointed with the dust of archives—the fact is that among historians we are provincials.

Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 553 (2011).

<sup>173</sup> Mawani, *supra* note 159, at 349.

<sup>174</sup> DERRIDA, *supra* note 167, at 1 (emphasis in original). As further explained by scholars Motha and van Rijswijk:

The archive traditionally delineates the site from which the law is drawn, and manifests the space of law’s authority. From its root in *arkheion*, the residence of *archons* or super magistrates, the archive is also where official documents were deposited. As Derrida reminds us, the *archons* had the power to make, represent, and interpret the law.

Motha & van Rijswijk, *supra* note 161, at 1.

<sup>175</sup> Motha & van Rijswijk, *supra* note 161, at 5.



Its constitutive relations and self-generating qualities are clearly manifest in law's citational and organizational structure of command. Its mutuality and mutability are evidenced in the ways that law conceives of, appropriates, and assimilates some knowledge as pertinent to legality while dismissing others as extraneous and nonexistent. As a self-referential system mandating recall, reference, and repetition, while also drawing selectively from other domains of knowledge, law generates documents and renders them potentially (ir)relevant. In so doing, it continually produces, expands, and destroys that which comprises its archive and in turn, that which constitutes law.<sup>176</sup>

At a fundamental level, this intimate connection between law and archive is seen in the “paper trails” of our statutes and in precedents that are a part of our common law.<sup>177</sup> As described in a recent hornbook co-authored by respected scholar Bryan Garner and twelve appellate judges, precedent “is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges . . . .”<sup>178</sup> The legal doctrine that commands a deference to precedence is *stare decisis*, which is derived from the maxim *stare decisis et non quieta movere*—“to stand by things decided and not disturb settled points.”<sup>179</sup> Precedent includes, then, the power to not only ensconce wise decisions, but to also enshrine wrong decisions—or in this case, inaccurate or patently false histories.<sup>180</sup> In short, by obeying the commands of *stare decisis*, it can create “abiding injustice as the cost of ensuring consistency and predictability more systemically.”<sup>181</sup> Worse, it may result in a sort of “judicial somnambulism,”<sup>182</sup> wherein judges pass judgment without giving careful consideration of the merits of the case at hand.<sup>183</sup>

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<sup>176</sup> Mawani, *supra* note 159, at 340–41.

<sup>177</sup> *Id.* at 341.

<sup>178</sup> BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 9 (2016).

<sup>179</sup> *Id.* at 5 (quoting GARNER'S *DICTIONARY OF LEGAL USAGE* 841 (3d ed. 2011)).

<sup>180</sup> *See id.* at 12.

<sup>181</sup> *Id.* at 13.

<sup>182</sup> *Id.* at 12 (quoting JEROME FRANK, *LAW AND THE MODERN MIND* 171 (1930)).

<sup>183</sup> *Id.*

In analyzing the ways that historians and legal practitioners approach the past, there are some similarities.<sup>184</sup> For example, they both “take the raw data of past events and fashion from them narratives that stand for the past.”<sup>185</sup> But unlike a historian, when a court interprets history, its version becomes “official” and thus legally authoritative. What makes this concerning, however, is that in our legal system, judges are known for often getting it wrong. From *Dred Scott v. Sandford*<sup>186</sup> to *Plessy v. Ferguson*,<sup>187</sup> and from *Hawai'i Housing Authority v. Midkiff*<sup>188</sup> to *Rice v. Cayetano*,<sup>189</sup>

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<sup>184</sup> As Judge Posner stated, “Law is the most historically oriented, or if you like the most backward-looking, the most ‘past dependent,’ of the professions.” Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000).

<sup>185</sup> Reiter, *supra* note 27, at 56.

<sup>186</sup> 60 U.S. (19 How.) 393 (1857) (holding that all blacks, enslaved or free, were not and could never become citizens of the United States and for that reason, had no standing in federal court). According to Chief Justice Taney, the framers of the Constitution believed that blacks “had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.” *Id.* at 407. Taney asserted that “it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . .” *Id.* at 410. As noted by several legal scholars, “Taney’s argument was supported with a patently erroneous historical gloss . . . .” Robert A. Burt, *Dred Scott and Brown v. Board of Education: A Frances Lewis Law Center Colloquium*, 42 WASH. & LEE L. REV. 1, 6 (1985) (citing Kelly, *supra* note 67, at 122).

<sup>187</sup> 163 U.S. 537 (1896) (sustaining constitutionality of state laws compelling racial segregation). Despite recognizing that the Fourteenth Amendment’s purpose was “to enforce the absolute equality of the two races,” the Court reasoned that the amendment “could not have been intended to abolish distinctions based upon color.” *Id.* at 544. According to legal scholar Leonard Levy, *Plessy* “displayed the Court’s disastrous use of history.” LEVY, *supra* note 67, at 317.

<sup>188</sup> 467 U.S. 229 (1984). As one scholar aptly explained, in *Midkiff*, “the Court unanimously held that the state could do the very thing that Justice William Paterson had said in 1795 that it could not do—take property from one citizen, even at a just compensation, and give it to another at that price.” LEVY, *supra* note 67, at 390. To arrive at this result, the Court adopted a misguided understanding of history that characterized Native Hawaiians as developing and adopting a feudal land tenure system. Justice O’Connor, in emphasizing the antifeudal nature of the Hawai’i Land Reform Act of 1967, wrote:

The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. . . . Regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.

*Midkiff*, 467 U.S. at 241–42 (footnote omitted).

<sup>189</sup> 528 U.S. 495 (2000) (concluding that the Office of Hawaiian Affairs’ law limiting the right to vote to qualified Native Hawaiians violated the Fifteenth Amendment because it was based entirely on a race-based voting qualification). Professor Troy Andrade provides

examples abound of the Supreme Court's misuse of history. As explained by Leonard Levy, "Two centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history."<sup>190</sup> Levy harshly rebuked the Justices stating, that they "stand censured for abusing historical evidence in a way that reflects adversely on their intellectual rectitude as well as on their historical competence."<sup>191</sup> This criticism was levelled at the Justices because "[t]he Court artfully selects historical facts from one side only, ignoring contrary data, in order to support, rationalize, or give respectability to judgments resting on other grounds."<sup>192</sup> These sentiments were echoed by Alfred H. Kelly, who described the Court's historical scholarship as "simplistic,"<sup>193</sup> and the result of "creative historical imagination."<sup>194</sup> Further, the Court was guilty of not only committing "historical felon[ies],"<sup>195</sup> but also "amateurish historical solecism[s]."<sup>196</sup> When courts commit these "historical felonies," the resulting impact can be far-reaching:

The court's historical interpretation may become part of the findings of fact, determine the outcome of the case, be entered in the official public records, become available for citation as binding precedent, and even establish a form of "official" public meaning of laws or of the Constitution itself. In other words, lawyers and judges can create an authoritative interpretation of the past that stands as an official government record, which can have real-world effects.<sup>197</sup>

These real-world effects are dramatically seen in the histories that have been told about Native Hawaiians by attorneys, judges, and scholars. By viewing Law as an Archive, it beckons us to critically evaluate the embedded record in statutes and precedent, and to interrogate the teleological narratives it produces. By doing so, we see reflected in these

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extensive analysis in his criticism of the Court's iteration of "history" in *Rice v. Cayetano*. See Andrade, *supra* note 31, at 649 ("[S]erious harm came from the Court's biased and selective narrative of Hawaiian history.").

<sup>190</sup> LEVY, *supra* note 67, at 300.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Kelly, *supra* note 67, at 119 (citing Mark DeWolfe Howe, *Split Decisions*, N.Y. REV. OF BOOKS 17 (1965)).

<sup>194</sup> *Id.* at 136.

<sup>195</sup> *Id.* at 135 ("To put the matter bluntly, Mr. Justice Black, in order to prove his point, mangled constitutional history.").

<sup>196</sup> *Id.* at 141 ("They were concerned with the problems of their day and not with those of ours, and to assume that a revelatory reconstruction is possible is to fall into an amateurish historical solecism.").

<sup>197</sup> Festa, *supra* note 67, at 506–07.

records decisions regarding what is “pertinent”<sup>198</sup> and what is “irrelevant.”<sup>199</sup> We also see how law develops and asserts its authority while also concealing and sanctioning its own material.<sup>200</sup>

My analysis begins by questioning what comprises law’s “archive” in Hawai‘i. I start with Hawai‘i’s most popular source of history, and I describe how it became sanctioned as a credible source—despite its lack of probity.

### B. Hawai‘i’s Historiography Is Flawed

Ua noa i na kanaka a pau loa ka moololo, hookahi mea nana i keakea, o ka  
naaupo o kanaka . . . .

History is freely available to all people, there being only one obstruction—the  
ignorance of man.

—Samuel M. Kamakau<sup>201</sup>

As legal scholar David Barnard stated, “[t]o narrate the history of the Hawaiian Islands is immediately to take sides in a political debate.”<sup>202</sup> Often times, the dominant Western narrative skips “the more than 1000 years of known human settlement in the Hawaiian Islands” opting instead to begin “with the ‘discovery’ of Hawaii by Captain James Cook in 1778.”<sup>203</sup> Take for example, Gavan Daws’ *Shoal of Time*—his version of history purportedly begins when “the existence of the Hawaiian Islands became known to Europeans.”<sup>204</sup> Daws’ *Shoal of Time* is “the #1 bestselling history of the islands,”<sup>205</sup> and has been cited by the U.S.

<sup>198</sup> See *id.* at 539–40.

<sup>199</sup> See *id.*

<sup>200</sup> *Id.* at 506–07.

<sup>201</sup> Samuel M. Kamakau, *Palpala mai a S.M. Kamakau mai*, KE AU OKOA, Sept. 12, 1865, at 3.

<sup>202</sup> David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 5 (2006).

<sup>203</sup> *Id.*

<sup>204</sup> GAVAN DAWS, *SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS* xi (1968).

<sup>205</sup> *Shoal of Time: A History of the Hawaiian Islands*, AMAZON, <https://www.amazon.com/Shoal-Time-History-Hawaiian-Islands-ebook/dp/B010RH98FS> (last visited Apr. 22, 2017) (“In SHOAL OF TIME, the #1 bestselling history of the islands, Gavan Daws tells the real-life story: how the winds of change, blowing from the big world, gusted through human life in Hawai‘i for more than two centuries, at hurricane force.”); see also Barnard, *supra* note 202, at 5 (“Gavan Daws, whose *Shoal of Time: A History of the Hawaiian Islands* is the most popular and most-often cited modern treatment . . .”).

Supreme Court,<sup>206</sup> the U.S. District Court for the District of Hawai‘i,<sup>207</sup> court briefs,<sup>208</sup> and various law journals.<sup>209</sup> Some scholars have questioned the underlying probity of Daws’ historical work,<sup>210</sup> but overwhelmingly, *Shoal of Time*, which was published nearly fifty years ago, is cited to support a historical fact.

Native Hawaiian scholar Dr. Jonathon K. Osorio described Daws as a scholar “with a wide range of abilities and a gift for historical writing.”<sup>211</sup> And while *Shoal of Time* is acknowledged as the most “widely read history of Hawai‘i,” Osorio notes that it is also “among the most criticized.”<sup>212</sup> According to Osorio, Daws “represents the irony of historiography itself:

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<sup>206</sup> See *Rice v. Cayetano*, 528 U.S. 495, 500 (2000) (citing DAWS, *supra* note 204, at xii–xiii).

<sup>207</sup> *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003) (citing DAWS, *supra* note 204, at xii–xiii), *aff’d in part, rev’d in part* 416 F.3d 1025 (9th Cir. 2005), and *rev’d in part on reconsideration* 470 F.3d 827 (9th Cir. 2006) (en banc).

<sup>208</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 569475, at \*2 (citing DAWS, *supra* note 204, at 2).

<sup>209</sup> See, e.g., Patrick W. Hanifin, *Rice is Right*, 3 ASIAN-PAC. L. & POL’Y J. 283, 298 n.76 (2002) (citing DAWS, *supra* note 204, at 214).

<sup>210</sup> See, e.g., Barnard, *supra* note 202, at 5 (“Gavan Daws, whose *Shoal of Time: A History of the Hawaiian Islands* is the most popular and most-often cited modern treatment, reveals its Western bias in the first sentence . . .”).

<sup>211</sup> Jonathan K. Osorio, *Living in Archives and Dreams: The Histories of Kuykendall and Daws*, in TEXTS AND CONTEXTS: REFLECTIONS IN PACIFIC ISLANDS HISTORIOGRAPHY 191, 196 (Doug Munro & Brig V. Lal eds., 2006).

<sup>212</sup> *Id.* (“[N]ative scholars in particular find Daws’ observations and piquant sense of humor and irony objectionable if not downright offensive.”). Osorio summarized some of the criticisms leveled at *Shoal of Time*: “The portrait [Daws] paints of many native individuals is often openly contemptuous, one reason why native readers today find *Shoal of Time* obnoxious and misleading, especially about the intentions and capacities of native Hawaiians.” *Id.* at 197. As explained by Osorio, Daws was particularly offensive in his treatment of the Māhele:

One example is [Daws’] recounting of the division and alienation of lands known as the Mahele, a seminal event in the Kingdom’s history when thousands of years of a tradition of land tenure based on mutual obligations between chiefs and people were suddenly replaced by legislation . . . . Writing in the late 1960s, Daws would not have known that within a few years the Mahele would come to be the strongest symbol of Hawaiian loss to several generations of Hawaiian scholars and activists. Nevertheless, his casual dismissal of the outcome of the Mahele as the result of the slowness of the chiefs to divide out their interests and the *maka‘ainana* being equally “dilatory” (127) is most unfortunate and strikes contemporary Hawaiians as incredibly insensitive if not downright stupid.

*Id.* at 198.

he was sympathetic to native culture... *but lacking any way of understanding that culture*, he chose to mock the institutions that he believed oppressed the poor and underclasses and spared no one, neither missionary nor native *ali'i*.”<sup>213</sup> Daws acknowledged this “lack of understanding” and how this impacted the way he conducted historical research about Native Hawaiians:

[S]ources on the life of the native community are all but intractable. The Hawaiians were not in the habit of explaining themselves or even exposing themselves in written form . . . . In general they did not initiate social action but were acted upon. I claim no special gift of empathy; wishing to understand the Hawaiians I found I could not, and I ended by merely trying to make sense out of what their white contemporaries said about them.<sup>214</sup>

Daws’ bibliography and citations, which are almost entirely comprised of English-language sources (an estimated 97%),<sup>215</sup> reflect his erroneous assumption that “Hawaiians were not in the habit” of “explaining themselves” in the “written form.” This assertion, however, is easily refuted by conducting even the most cursory of research in the repositories that Daws purportedly utilized. Not only does this demonstrate a shocking level of scholarly negligence, it directly impacted the way Daws framed and crafted his history about Native Hawaiians.

With sweeping statements about what Hawaiians did or did not write, it is not entirely surprising that so many who choose to write about Hawai’i’s history proceed under the false assumption that English sources are the best and offer all that is left to “uncover” the past. The result is a hegemonic historiography that has been sourced almost exclusively from English sources. As ‘Ōiwi scholar Noenoe Silva stated:

By the mid-twentieth century, the idea that English was the language of Hawai’i seemed natural, especially because, except by some persistent Kānaka, Hawai’i was no longer regarded as a separate nation with its own people having their own history and language. When historians and others

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<sup>213</sup> *Id.* at 196.

<sup>214</sup> Gavan Daws, *Writing Local History in Hawaii—A Personal Note*, 2 HAW. HIST. REV. 417, 418 (1968).

<sup>215</sup> This is an approximation based on what was contained in Daws’ bibliography—which Daws readily admitted was incomplete: “This list of references does not pretend to comprehensiveness or even formality. Only those sources actually cited in the footnotes are listed, and often their titles appear in the bibliography shortened unceremoniously.” Daws, *supra* note 204, at 400. In arriving at this calculation, I erred on the side of over-inclusiveness. Of the 562 total sources contained in the bibliography, approximately 19 sources cited are in the Hawaiian language, or were written in both English and Hawaiian.

composed their narratives, they “naturally” conducted their research using only the English-language sources.<sup>216</sup>

In short, the master narrative as incorporated in histories about Hawai‘i reflects the normalized belief that full and unbiased histories may be created from an English-only record. These histories were later embraced by courts and legal scholars, thus becoming a part of law’s archive.

Because many lack an understanding of what actually exists, or perhaps willfully choose to ignore it, Hawai‘i’s flawed historiography has resulted in a perpetuating discourse<sup>217</sup> that has become embedded in our legal scholarship and enshrined in case law as *stare decisis*. In short, the lack of Hawaiian-language fluency coupled with the false assumption of a “wasteland” of missing history has resulted in the silencing of an entire nation of people.

*C. The Silencing of Mānaleo<sup>218</sup>: The Effect of Colonialism on the Hawaiian Language Corpus of Archival Materials*

Nānā i ke kumu.

Look to the source.<sup>219</sup>

It is undeniable that language is central to a culture’s history and identity. Indeed, on February 1, 2017, the Pew Research Center, a “nonpartisan fact tank” that conducts “public opinion polling, demographic research, content analysis and other data-driven social science research[.]”<sup>220</sup> released a study that revealed how national identity is defined across different countries.<sup>221</sup> According to this study, while such factors as religion, place of birth,

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<sup>216</sup> See SILVA, *supra* note 23, at 3.

<sup>217</sup> *Id.* at 9.

<sup>218</sup> The term “mānaleo,” refers to a “Native speaker, a term invented by Larry Kimura and William H. Wilson in the late 1970s. *Lit.*, inherited language.” PUKUI & ELBERT, *supra* note 2, at 236.

<sup>219</sup> The term “nānā” means to “look at, observe, see, notice, inspect; to care for, pay attention to, take care of.” *Id.* at 260. The term “kumu,” refers to the “beginning, source, origin . . . .” *Id.* at 182.

<sup>220</sup> About Pew Research Center, PEW RESEARCH CTR., <http://www.pewresearch.org/about/> (last visited Apr. 22, 2017).

<sup>221</sup> BRUCE STOKES, PEW RESEARCH CTR., WHAT IT TAKES TO TRULY BE ‘ONE OF US’: IN U.S., CANADA, EUROPE, AUSTRALIA AND JAPAN, PUBLICS SAY LANGUAGE MATTERS MORE TO NATIONAL IDENTITY THAN BIRTHPLACE (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/04/14094140/Pew-Research-Center-National-Identity-Report-FINAL-February-1-2017.pdf>.

nationality, and shared customs and traditions were viewed as important for establishing national identity, language was “far and away . . . seen as the most critical to national identity.”<sup>222</sup> This sentiment rings particularly true for Kānaka ‘Ōiwi as is evident in the following famous ‘Ōlelo No‘eau: “I ka ‘ōlelo no ke ola, i ka ‘ōlelo no ka make,” which means, “Words can heal; words can destroy.”<sup>223</sup> A contemporary translation for this Hawaiian proverb is, “In the Hawaiian language we find the life of our race, without it (the Hawaiian language) we shall perish.”<sup>224</sup> Thus, if one truly wants to write about Native Hawaiians, the lifeblood—and thus the history—of our people will only be found in our language.

Unfortunately, for generations, knowledge about the history of Hawai‘i has been limited “at every level by scholarship that accepts a fraction of the available sources as being sufficient to represent the huge collection of material that actually exists.”<sup>225</sup> According to Dr. Noelani Arista, the written and published corpus in ‘Ōlelo Hawai‘i (the Hawaiian language) is “the largest in any indigenous language in the United States and possibly the Polynesian Pacific . . . .”<sup>226</sup> It is estimated that “less than one percent of the whole[] has been translated and published”<sup>227</sup> and “[t]he rest, equal to well over a million letter-size pages of text, remains untranslated, difficult to access in the original form, unused, and largely unknown.”<sup>228</sup>

The available corpus in ‘Ōlelo Hawai‘i comprise a “detailed, almost daily accounting of colonial and imperial processes that span the period from colonial settlement to the overthrow of a native nation and its aftermath (1820-1948).”<sup>229</sup> The produced materials—by both foreigner and Native Hawaiian writers—document in the Hawaiian language the transformation of a nation, with sources “supplying innumerable first-hand accounts of native lives in transition.”<sup>230</sup>

<sup>222</sup> *Id.* at 8.

<sup>223</sup> See PUKUI, *supra* note 7, at 129 n.1191.

<sup>224</sup> ‘Ōlelo No‘eau, ‘AHA PŪNANA LEO, [http://www.ahapunanaleo.org/index.php/?/programs/ohana\\_info/olelo\\_noeau/](http://www.ahapunanaleo.org/index.php/?/programs/ohana_info/olelo_noeau/) (last visited Apr. 22, 2017).

<sup>225</sup> See NOGELMEIER, *supra* note 11, at 1.

<sup>226</sup> See Arista, *supra* note 11, at 1.

<sup>227</sup> See NOGELMEIER, *supra* note 11, at XIII.

<sup>228</sup> See *id.* Hawai‘i arguably has “the largest literature base of any native language in the Pacific and perhaps all native North America, exceeding a million pages of printed text . . . .” Noelani Arista, *Navigating Uncharted Oceans of Meaning: Kaona as Historical and Interpretive Method*, 125 PROC. MOD. LANGUAGE ASS’N, 663, 665 (2010). For example, “from 1834 to 1948, Hawaiian writers filled 125,000 pages in nearly 100 different newspapers with their writings.” NOGELMEIER, *supra* note 11, at XII.

<sup>229</sup> See Arista, *supra* note 11, at 1.

<sup>230</sup> *Id.*



Despite the vast wealth of knowledge available, it is still commonly believed that scholars writing about Hawai‘i’s history must deal with “source scarcity.”<sup>231</sup> Scholars today interested in Hawai‘i history are not faced with archival destruction, as has occurred in many Native American and other indigenous sites of colonial contest,<sup>232</sup> and is currently occurring in our world today.<sup>233</sup> Instead, scholars are proceeding under the mistaken presumption that the English sources and the small corpus of Hawaiian materials that have been translated offer sufficient insight to write an “unbiased history.”

According to Hawaiian language scholar Dr. Puakea Nogelmeier, the few Hawaiian language primary sources<sup>234</sup> that have been incorporated into modern scholarship are problematic at best—worse, they eclipse the larger corpus of original writings that remain unrecognized.<sup>235</sup> The corpus referred to here is comprised of seven books translated from the words of four nineteenth-century Hawaiian authors, Samuel Mānaiakalani Kamakau, John Papa ‘Ī‘Ī, Davida Malo, Kepelino Keauokalani.<sup>236</sup> Nogelmeier is not alone in his critical assessment of these English language translations—prominent and respected scholars of ‘Ōlelo Hawai‘i, such as Dr. Noelani Arista, Dr. Jeffrey Kapali Lyon, and Dr. Ronald Williams, to name just a few, have also written extensively about the problems relating to English language translations that so many historians rely upon.<sup>237</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 2.

<sup>233</sup> See, e.g., Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq*, 91 INT’L L. STUD. 641, 663 (2015). Arimatsu and Choudhury state:

Mari (Tell Hariri) is an ancient Mesopotamian city located close to the border with Iraq and dates back to 2900 BC. It is a rich archeological site exemplified by the discovery of an archive containing fifty thousand clay tablets . . . . Conservation efforts were suspended with the outbreak of war. The looting at the site has worsened over time, and by early 2014, illegal excavations were reportedly being carried out by an ‘armed gang.’ In June 2014, Mari and the surrounding territory fell under ISIS control.

*Id.*

<sup>234</sup> See NOGELMEIER, *supra* note 11, at XIII. The translated words of these authors have “become an articulated bastion of Hawaiian reference, and have been granted an overwhelming and far-reaching authority about Hawaiian culture and history.” *Id.*

<sup>235</sup> *Id.* at 3. It is estimated that the “sum of these works makes up only a fraction of one percent of the available primary material . . . .” *Id.* at 2.

<sup>236</sup> *Id.* These works are most commonly relied upon for historical information about Native Hawaiians. *Id.*

<sup>237</sup> See discussion *infra* at 578–83.

One issue with the translated versions is that the content of the original works was “reduced, re-ordered, and decontextualized.”<sup>238</sup> This problematic methodology resulted in what Nogelmeier refers to as “epistemological overlay” or “dominant overwriting” where Hawaiian writings have been clearly reworked to fit and reinforce Western intellectual paradigms.<sup>239</sup> This process of “dominant overwriting” is seen not only in the way the original source materials were presented, but also in the way materials were actually translated. For example, Dr. Lyon analyzed the translations for Davida Malo’s *Mo‘olelo Hawai‘i*, popularly known by its English title *Hawaiian Antiquities*, as translated by Nathaniel Emerson.<sup>240</sup> The table below has been adapted from Dr. Lyon’s article and provides insight into this practice of “dominant overwriting”:

Table 1: Example of Dominant Overwriting.<sup>241</sup>

<b>Davida Malo</b> (original with modern orthography added)	<b>N.B. Emerson</b> (from <i>Hawaiian Antiquities</i> )	<b>Langlas-Lyon</b> (close translation)
Mokuna XXXI No ke Kilokilo ‘Uhane  1. He mea ho‘omana ke kilokilo ‘uhane. He hana nui nō ia ma Hawai‘i nei, he mea ho‘oweliweli nō e ho‘opunipuni ai, me ka ho‘oilolo a me ke koho wale aku e make ka mea nona ka ‘uhane āna i ‘ike ai, he mea nō e kaumaha ai ka na‘au o kahi po‘e me ka weliweli nui loa.	CHAPTER XXXI. NECROMANCY  1. Necromancy, <i>kilokilo uhane</i> , was a superstitious ceremony very much practiced in Hawaii nei. It was a system in which barefaced lying and deceit were combined with shrewd conjecture, in which the principal extorted wealth from his victims by a process of terrorizing, averring, for instance, that he had seen the wraith of the victim, and that it was undoubtedly ominous of his impending death. By means of this sort great terror and brooding horror were made to settle on the minds of certain persons.	Chapter 31. Concerning Kilokilo ‘Uhane  1. <i>Kilokilo ‘uhane</i> [soul sighting] was a religious activity. It was greatly practiced here in Hawai‘i, a frightening practice used to deceive others by predicting disaster, supposing that the person whose spirit had been seen would die. It was indeed a practice that weighed down the spirit of some people with great terror.

<sup>238</sup> See NOGELMEIER, *supra* note 11, at 3.  
<sup>239</sup> *Id.* at 29. It is beyond the scope of this article to delve too deeply into this topic.  
<sup>240</sup> Jeffrey Lyon, *Malō’s Mo‘olelo Hawai‘i: The Lost Translation*, 47 HAWAIIAN J. HIST. 27 (2013).  
<sup>241</sup> *Id.* at 42 (alterations in original).

The selected title of the chapter, “Necromancy,” reveals how Malo’s work has been translated in such a way to reflect Western intellectual paradigms. As Dr. Lyon observed, “19th century translators of Hawaiian usually rendered each Hawaiian term by what they considered the closest English equivalent, even when there really was no suitable equivalent.”<sup>242</sup> Emerson’s use of the term “necromancy” is “unsuitable since *kilokilo* ‘*ūhane* (soul sighting) here refers to the wandering souls of *living persons*.”<sup>243</sup> The term “necromancy,” which has a “primary meaning of ‘conjuration of the spirits of the dead’” results in “a pejorative rendering of *kilokilo* ‘*ūhane* (soul sighting).”<sup>244</sup> Indeed, Emerson’s translation is “far longer and far more literary than Malo’s original . . . [and] is also far more censorious.”<sup>245</sup>

In sum, the issue of “dominant overwriting” should be a serious concern for any scholar who decides to rely on these translations. A more obvious issue that scholars should be cognizant of, however, are mistranslations. For example, Nogelmeier noted that in an article from *Nupepa Kuokoa* dated November 30, 1867, the original passage stated: “Ke mau nei no hoi ka moe lehulehu, e like me ka wa kahiko.”<sup>246</sup> The literal translation should read as follows, “Numerous sexual liaisons are still ongoing, just as in ancient times.”<sup>247</sup> However, the translation of that same passage that was published in Kamakau’s *Ruling Chiefs* reads: “Today, licentiousness is more common than formerly.”<sup>248</sup> The error is small, but incorrectly conveys comparative qualities that Kamakau never intended—indeed, his statement only references a continuation of “numerous sexual liaisons.”<sup>249</sup> One might want to believe that such errors are rare, but there is evidence that this is not the case.<sup>250</sup>

Entire histories about Native Hawaiians have been based on the writings of these four men, and while these works are a valuable source of information, their writings are only a fragment of what hundreds of Hawaiian writers generated in the span of more than a century.<sup>251</sup> This reliance on heavily edited and often condensed English-language

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<sup>242</sup> *Id.* at 51.

<sup>243</sup> *Id.* (emphasis added) (italicization of *kilokilo* ‘*ūhane* in original).

<sup>244</sup> *Id.* (italicization of *kilokilo* ‘*ūhane* in original).

<sup>245</sup> *Id.*

<sup>246</sup> NOGELMEIER, *supra* note 11, at 130.

<sup>247</sup> *Id.* at 131.

<sup>248</sup> *Id.* (citation omitted).

<sup>249</sup> *Id.*

<sup>250</sup> *See id.*

<sup>251</sup> *See id.* at 3.

translations of a handful of Hawaiian texts has perpetuated a “discourse of sufficiency”—in other words, that such texts are “sufficient” to embody nearly a hundred years of extensive auto-representation, where Hawaiians wrote for and about themselves.<sup>252</sup> The scope of available information is extensive. But to access these materials, or to even know that it exists, requires that the scholar first obtain cultural and linguistic competency in ‘Ōlelo Hawai‘i.<sup>253</sup> For whatever reason, however, scholars have eschewed this prerequisite and have opted to rely solely on the English translations.<sup>254</sup>

While it was perhaps unconscious at times, the “erasure[] at work in [these] Eurocentric translations . . . [reflects a] long history of Westerners imposing their beliefs, customs, education, and language on the Hawaiian people . . . .”<sup>255</sup> Over time, many scholars have contributed to the perpetuation of this discursive practice by failing to see the necessity of obtaining “linguistic and cultural fluency,” instead choosing to base their work about Hawai‘i and Native Hawaiians largely on sources that have been translated into English.<sup>256</sup> This “discourse of sufficiency”<sup>257</sup> has informed prevailing scholarship and mindsets, and has resulted in the

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<sup>252</sup> *Id.* at 1–2.

<sup>253</sup> This is not a unique concept. Constitutional law scholar H. Jefferson Powell explained in his article, *Rules for Originalists*, that “[w]hen a modern American student of ancient Near Eastern civilization interprets an Akkadian text from the second millennium B.C.E. . . . she is highly unlikely to forget that she is dealing with the artifact of a culture different from her own.” Powell, *supra* note 71, at 672. Because the text is written in a different language, “[t]here is an unmistakably great historical, conceptual, and cultural distance between the student and the ancient writer.” *Id.* at 673. Originalists falsely believe that because the founders spoke “recognizably modern English,” that the “historical distance” between 1987 and 1787 or 1868 and 2017 “is effectively zero.” *Id.* The assumption is that the founders could participate in our contemporary constitutional conversation without the aid of a translator. *Id.* According to Powell, that is a false assumption—an originalist interpreter of the U.S. Constitution needs a translator to bridge the historical gap between our modern presuppositions and cultural concepts and the thoughts of the founders. *Id.* Thus, to properly fashion a history about any society, one should obtain cultural and linguistic competency, or at least work with a competent translator who has those capabilities.

<sup>254</sup> It is often frustrating for many Native Hawaiian scholars because the concept seems quite straightforward: if one sought to write a history about the political and legal history of nineteenth-century France, a careful and thorough researcher would learn French, work with a skilled translator, or at least acknowledge that their work is based solely on English-language sources.

<sup>255</sup> See BROWN, *supra* note 23, at 9.

<sup>256</sup> See Arista, *supra* note 11, at 665.

<sup>257</sup> BROWN, *supra* note 23, at 4 (quoting NOGELMEIER, *supra* note 11, at 1).

continued institutional support for these flawed perspectives<sup>258</sup>—as is evident in our current system of law and legal process.

Indeed, in the context of legal scholarship, academics, jurists, and practitioners have the ability to create an authoritative, historical interpretation of the past. Through their analysis, they have the power to discredit some sources, and elevate other sources. For example, the historical events surrounding the 1893 overthrow of the Hawaiian monarchy are often a source of controversy and many seek to write about it in the legal community. As noted in a Georgetown Law Journal, there are “numerous factual accounts of what happened during the fateful days of insurrection, though, unfortunately, they tend to be biased and are often contradictory.”<sup>259</sup>

According to the author, however, “one of the more balanced accounts” may be found in Ernest Andrade’s *Unconquerable Rebel: Robert W. Wilcox and Hawaiian Politics, 1880–1903*.<sup>260</sup> Andrade’s book was lauded as a carefully researched biography that presented “historical facts” from a “critical time in Hawaiian history.”<sup>261</sup> Andrade’s book contains nearly 740 citations—but like Daws, it fails to reference a “single Hawaiian-language citation from any of the dozens of Hawaiian-language newspapers, manuscript collections, or books about the topic that were produced during the period covered by the text.”<sup>262</sup> Andrade acknowledges in his book that it “was based on newspaper accounts more than on any other single kind of source.”<sup>263</sup> And indeed, his work reflects this insofar the accounts are “nearly a transcription of the English-language presses’ view of Wilcox and the political events of the period . . . .”<sup>264</sup> This is highly problematic because a close review of the cited newspapers utilized by Andrade reveals a troubling pattern. The newspapers that Andrade relies upon were wholly comprised of the “establishment-official press,” which essentially “spoke for no more than five to six percent of the population” in Hawai‘i.<sup>265</sup>

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<sup>258</sup> See *id.* at 4.

<sup>259</sup> Eric Steven O’Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 511 (2001).

<sup>260</sup> *Id.* at 511 n.62 (citing ERNEST ANDRADE, JR. *UNCONQUERABLE REBEL: ROBERT W. WILCOX AND HAWAIIAN POLITICS, 1880–1903*, at 116–28 (1996)).

<sup>261</sup> Ronald Williams Jr., *‘Ike Mōakaaka, Seeing a Path Forward: Historiography in Hawai‘i*, 7 HŪLILI 67, 73 (2011) (quoting James V. Hall, *Book Review*, 71 PAC. AFF. 143, 143–44 (1998) (reviewing ANDRADE, *supra* note 260)).

<sup>262</sup> *Id.*

<sup>263</sup> ANDRADE, *supra* note 260, at 287.

<sup>264</sup> Williams, *supra* note 261, at 74.

<sup>265</sup> See *infra* Section III.E.

Andrade’s work—a purported biography about a Native Hawaiian political figure—was heralded in a respected law journal as “one of the more balanced accounts” of the 1893 overthrow.<sup>266</sup> The term “balance” means, *inter alia*, to “equalize in number, force, or effect; to bring into proportion.”<sup>267</sup> As described more carefully below in Sections III.D through E, the problem with using English-only sources to craft a legal history about Native Hawaiians is that it does not result in “balance.” It perpetuates a discourse of sufficiency in what has become a pervasive force in legal scholarship, and has resulted in the continued institutional support for these dominant viewpoints. In short, this discourse of sufficiency has effectually silenced native voice.

*D. Lost in Translation: The Disappearance of Hawaiian in Hawai‘i’s Legal History*

“[T]hough the Hawaiian language is the original language of this people and country, the English language is largely in use. Of necessity the English language must be largely employed to record the transactions of the government in its various branches . . . .”

—Chief Justice A.F. Judd (1892)<sup>268</sup>

“The mere fact that Hawaiian is also an official language of Hawaii does not compel this Court to ignore the practical realities of this dispute.

. . . .

[The use of Hawaiian] would only add needless delays and costs to this dispute . . . .”

—Senior U.S. District Judge Alan Kay (1994)<sup>269</sup>

According to a 2015 U.S. Census Bureau Report analyzing data from a 2009 to 2013 American Community Survey, in Hawai‘i, of the over 1.2 million people aged 5 and older, an estimated 326,893 people, or 25% of the population, spoke a language other than English at home.<sup>270</sup> The

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<sup>266</sup> Eric Steven O’Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 511 n.62 (2001).

<sup>267</sup> See *Balance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

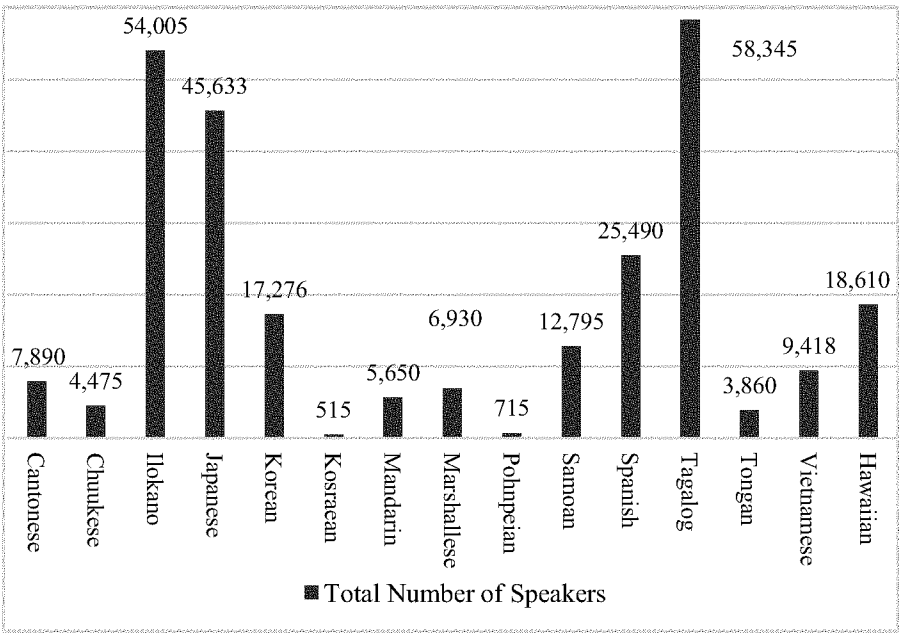
<sup>268</sup> *In re Ross*, 8 Haw. 478, 480 (Haw. Kingdom 1892).

<sup>269</sup> *Tagupa v. Odo*, 843 F. Supp 630, 631, 634 (D. Haw. 1994).

<sup>270</sup> U.S. CENSUS BUREAU, DETAILED LANGUAGES SPOKEN AT HOME AND ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER FOR STATES: 2009–2013 (2013), <http://www2.census.gov/library/data/tables/2008/demo/language-use/2009-2013-acs-lang-tables-state.xls> (providing tabular multi-year data and listing all languages spoken in the

Hawai‘i Judiciary, in recognition of Hawai‘i’s cultural and linguistic diversity, has made strides to provide access to the courts. The Judiciary website reflects this commitment to diversity in its language access policies which state in pertinent part, “The Hawai‘i State Judiciary is committed to providing meaningful access to court process and services to persons with limited English proficiency.”<sup>271</sup> The Language Access Services homepage on the Judiciary website is available in the following languages: Cantonese, Chuukese, Ilokano, Japanese, Korean, Kosraean, Mandarin, Marshallese, Pohnpeian, Samoan, Spanish, Tagalog, Tongan, and Vietnamese.<sup>272</sup> The 2015 Census Bureau Report<sup>273</sup> provides the total number of speakers for each of these languages and is graphically produced below in Table 2:

Table 2: Selected Languages Spoken in Hawai‘i<sup>274</sup>



United States that were reported during the sample period).

<sup>271</sup> Mark E. Recktenwald, *Judiciary Language Assistance Policy*, HAW. STATE JUDICIARY, [http://www.courts.state.hi.us/services/language\\_assistance\\_services](http://www.courts.state.hi.us/services/language_assistance_services) (last visited Apr. 22, 2017).

<sup>272</sup> *Id.*

<sup>273</sup> U.S. CENSUS BUREAU, *supra* note 270.

<sup>274</sup> *See id.*

Of the languages listed on the Judiciary website, only four languages are more prevalent in Hawai'i than Hawaiian: Tagalog (58,345), Ilokano (54,005), Japanese (45,633), and Spanish (25,490).<sup>275</sup> Sadly, Hawaiian is not currently listed on the Language Access Services homepage,<sup>276</sup> even though Article XV, Section 4 of the Hawai'i State Constitution recognizes the Hawaiian language as a co-official language of the State.<sup>277</sup>

How we arrived at this ironic situation—a situation where Hawaiian has no meaningful place in Hawai'i's legal system—requires us to look critically at how our legal and political system has been used to effectually render Hawaiian a nullity. It certainly was not because Native Hawaiians had little to say. Indeed, the available legal corpus in 'Ōlelo Hawai'i is extensive, comprising a wide range of materials—from international treaties,<sup>278</sup> to a legal form book,<sup>279</sup> from constitutions<sup>280</sup> to a legal digest,<sup>281</sup> from statutes<sup>282</sup> to Privy Council minutes<sup>283</sup>—the list goes on and on. Beyond the estimated thousands of civil and criminal cases from lower courts in 'Ōlelo Hawai'i,<sup>284</sup> there are also three volumes of reported

<sup>275</sup> *Id.*

<sup>276</sup> HAW. STATE JUDICIARY, *supra* note 271.

<sup>277</sup> HAW. CONST. art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawai'i except that Hawaiian shall be required for public acts and transactions only as provided by law.").

<sup>278</sup> *See, e.g.*, He Olelo Kuikahi, Treaty of Friendship, Commerce and Navigation, Haw.-U.S., Det. 23, 1826 (on file at the Hawai'i State Archives).

<sup>279</sup> J.W.H. KAUWAHI, HE KUHUKUHI O KE KANAKA HAWAII (Honolulu, H.M. Wini. 1857) (providing guide in 'Ōlelo Hawai'i concerning fundamental court documents and procedures, including sample forms for deeds, mortgages, dower, etc.).

<sup>280</sup> *See, e.g.*, *infra* note 291.

<sup>281</sup> *See, e.g.*, 3 KE ALAKAI O KE KANAKA HAWAII (Joseph M. Poepoe trans., Honolulu, Haw. Gazette Co. 1891) (providing a topical guide concerning Hawai'i laws, court rules, and decisions of the supreme court).

<sup>282</sup> *See, e.g.*, *infra* note 300.

<sup>283</sup> *See* KINGDOM OF HAW. PRIVY COUNCIL, MINUTES OF THE PRIVY COUNCIL (1845–1892) (on file at the Hawai'i State Archives) (providing minutes of the council which served to advise the King in all matters relating to the administration of the executive affairs of the government).

<sup>284</sup> The Hawai'i State Archives is the main repository for court records from the nineteenth-century. Approximately 6,527 criminal cases and 6,031 civil cases from the time period of 1847 to 1893 are contained in the archives. *See* HAW. STATE ARCHIVES, FINDING AID: RECORDS OF THE JUDICIARY BRANCH 1839–1970 (2009) (on file at the Hawai'i State Archives). And while I do not have statistical data detailing the exact number of cases in 'Ōlelo Hawai'i due to the lack of an existing index or database, the estimated total provided was based on personal experience and anecdotal evidence from others who regularly use these collections.



decisions in ‘Ōlelo Hawai‘i.<sup>285</sup> Thus, it is impossible to claim that there is a dearth of available material for interested scholars.

By unearthing the embedded record contained in law’s archive, we come to recognize how and why the Hawaiian language became a “foreign language” in its own land. By carefully tracing and interrogating law’s archival record, we can expose the faulty reasoning that has long supported the “forgone conclusion” that it is perfectly acceptable, and even laudatory, to write a history about Native Hawaiians, without utilizing Hawaiian language sources authored by Native Hawaiians.

To properly describe the emergence, development, and selective appropriation of Euro-American legal and political practices by Native Hawaiians during the nineteenth-century is beyond the scope of this article—other scholars dedicate entire books to this endeavor.<sup>286</sup> It is sufficient to say, however, that from the beginning, Native Hawaiian legal and political practices were largely intended to be conducted and conveyed in ‘Ōlelo Hawai‘i and English.<sup>287</sup>

For example, on June 2, 1825, the first recorded laws appearing in both ‘Ōlelo Hawai‘i and English were published as broadsides.<sup>288</sup> In 1827, King Kamehameha III promulgated in ‘Ōlelo Hawai‘i one of the first printed examples of a penal code which prohibited murder, theft, adultery, liquor, prostitution, and gambling.<sup>289</sup> In 1839, Kamehameha III enacted the first formalized codification of laws in ‘Ōlelo Hawai‘i—commonly referred to

<sup>285</sup> NA OLELO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE A ME HOOKO KAHOA, 1857–1881 (Henry L. Sheldon trans., Honolulu, Papa Pai o ka Hui P.C. Advertiser 1881); NA OLELO HOOHOLO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE, HOOKO KAHOA, A ME KA AHA MOANA (William P. Ragsdale trans., Honolulu, Keena Paipalapala Aupuni 1867); I KE ALAKAI O KE KANAKA HAWAII (Joseph M. Peopoe trans., Honolulu, Haw. Gazette Co. 1891).

<sup>286</sup> See, e.g., BEAMER, *supra* note 23.

<sup>287</sup> This is an important fact that cannot be overstated. All too often, scholars who write about Hawai‘i’s legal history proceed without this most basic understanding, relying solely on the English version to their detriment. The assumption, of course, is that the English version serves as an exact replica of the Hawaiian version. As explained below, however, this is not the case and problems in legal translations are common even in modern times—regardless of the language.

<sup>288</sup> HE MAU KANAWAI NO KE AVA O HONORURU, OAHU—REGULATIONS FOR THE PORT OF HONOLULU (June 2, 1825) (on file at the Hawai‘i State Archives). Legal proclamations began appearing as early as 1822—however, some of these laws were issued in English only. Some argue this is because these laws were directed mainly toward unruly foreigners, not Native Hawaiians. See, e.g., BEAMER, *supra* note 23, at 106 (“From the examples I have found, it appears that many of these laws regulated the behavior of foreigners and, to a lesser extent, that of the maka‘āinana.”).

<sup>289</sup> HE OLELO NO KE KANAWAI (Dek. 8, 1827) (on file at the Hawai‘i State Archives).

as the “Bill of Rights”—and it was entitled *He Kumu Kanawai a me ke Kanawai Hooponopono Waiwai no ko Hawaii Nei Pae Aina*.<sup>290</sup> One year later, Hawai'i's first detailed Constitution was enacted in ‘Ōlelo Hawai'i and was entitled, *Ke Kumukanawai a me na Kanawai o ko Hawaii Pae Aina*.<sup>291</sup> In 1841, an English-language edition was published for both the Constitution of 1840 and the 1839 Bill of Rights.<sup>292</sup> This is significant because as recognized by ‘Ōiwi scholar Kamana Beamer, these two documents “were written in Hawaiian and only later translated into English, making the Hawaiian versions the original sources.”<sup>293</sup> For this reason,

[r]eliance on the English texts may undermine analysis and lead scholars to gloss over, or miss entirely, aspects of traditional governance embedded in these early records. The Hawaiian sources provide us with the best insights into what the ali'i were attempting to transform and how they viewed this change in relation to older systems of governance.<sup>294</sup>

This key concept is missed by many scholars, including Judge Burns who cites to the English translations of these two documents<sup>295</sup> to support a version of history that allegedly encapsulates the thoughts and beliefs of the ali'i and the “common people.” Not surprisingly, the “thoughts” and “intentions” of Kānaka ‘Ōiwi will not be found in these English translations.

Even within these translations, however, the reader is told that certain aspects of traditional ‘Ōiwi governance were incorporated in these early laws—thus signaling to a responsible scholar that careful analysis of the underlying primary source is necessary. For example, within the preface to the translation for the 1840 Constitution, the translator acknowledged that while many of Hawai'i's laws were of “quite recent date,” there was also “some thing [sic] like a system of common law” that consisted “partly in

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<sup>290</sup> HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAII NEI PAE AINA (Honolulu, n. pub. 1840) (enacted on June 7, 1839).

<sup>291</sup> KE KUMUKANAWAI A ME NA KANAWAI O KO HAWAII PAE AINA (Honolulu, n. pub. 1841) (enacted on Oct. 8, 1840) [hereinafter 1840 KUMUKANAWAI].

<sup>292</sup> TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III (G.P. Judd trans., Honolulu, n. pub. 1842) [hereinafter TRANSLATION OF 1840 CONSTITUTION].

<sup>293</sup> BEAMER, *supra* note 23, at 127; *see also* MERRY, *supra* note 23, at 78–79 (“Thus the Declaration of Rights, the 1840 Constitution, and the laws of 1841 and 1842, although Anglo-American in some of their inspiration, were joined with Hawaiian systems of law and interpretations of Christian-educated Hawaiians and the Hawaiian-speaking missionary Richards. The result was a system of laws far closer to Hawaiian law than subsequent legislation beginning in 1845.”).

<sup>294</sup> BEAMER, *supra* note 23, at 127.

<sup>295</sup> *See, e.g.*, Burns, *supra* note 6, at 218–19,

[the] ancient taboos, and partly in the practices of the celebrated chiefs as the history of them has been handed down by tradition . . . .”<sup>296</sup> As such, because “several of the original laws” were written by ‘Ōiwi,<sup>297</sup> native customs and concepts were considered and incorporated in these early laws. Thus, failing to cite a single source in ‘Ōlelo Hawai‘i, while simultaneously proclaiming to write about the “intentions” and “beliefs” of ‘Ōiwi is not just a serious oversight—it is also offensive.

Moreover, with regard to the primacy of the Hawaiian language, the preface to the 1840 Constitution stated:

The following is a translation of the [C]onstitution of the Hawaiian Government . . . . The translation is not designed to be a perfectly literal one, but where ever there is a variation from the letter of the original it is always made with the design of giving the sense more clearly. . . . *The original [Hawaiian] will of course be the basis of all judicial proceedings.*<sup>298</sup>

Thus, from the beginning, primary legal sources were promulgated in ‘Ōlelo Hawai‘i—the original language that was intended to be used by the legislature and the judiciary.

With regard to the judiciary, the Constitution of 1840 vested judicial power in the supreme court which consisted of the Mō‘ī (King) as chief judge, the Kuhina (Premier), and four persons appointed by the representative body.<sup>299</sup> The supreme court conducted its proceedings in Hawaiian, and the “views, arguments and reasonings adduced” were mandated to be “written or printed in the Hawaiian language.”<sup>300</sup> From 1840 to 1852, the Mō‘ī was the chief justice of the supreme court and the four associate justices were ‘Ōiwi.<sup>301</sup>

<sup>296</sup> TRANSLATION OF 1840 CONSTITUTION, *supra* note 292, at 3.

<sup>297</sup> *See id.* at 4.

<sup>298</sup> *Id.* at 3 (emphasis added).

<sup>299</sup> *Id.* at 13, 19–20; 1840 KUMUKANAWAI, *supra* note 291, at 5, 12–13.

<sup>300</sup> This was best evidenced in Hawai‘i’s 1847 Act to Organize the Judiciary Department. *See* 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS, ch. III, art. III, §§ X–XI, at 37 (Honolulu, Gov’t Press 1847) (enacted Sept. 7, 1847) [hereinafter 1847 STATUTE LAWS] (“And all proceedings of [the supreme] court shall be registered and kept in the Hawaiian language.”); 2 KANAWAI I KAUIA E KA MOI, E KAMEHAMEHA III, KE ALII O KO HAWAII PAE AINA, mok. 3, Haa. III, §§ X–XI, at 37–38 (Honolulu, Mea Pai a Na Misionary Amerika 1847) (enacted Sept. 7, 1847) [hereinafter 1847 KANAWAI] (“O na hoopii a pau, na hoopii mua a me na hoopii hope, a kakauia kela hoopii ana ma ka moohoopii e ke Kakauolelo o ua Aha la, a e kakauia na moolelo a pau no ka Ahahookolokolokiekie ma ka olelo Hawaii.”).

<sup>301</sup> King Kamehameha III, Mō‘ī, served as chief justice, and Kekāuluohi, Kuhina, served as an associate justice. On May 10, 1842, the representative body appointed four associates justices: Z. Ka’auwai, Abner Paki, Charles Kanaina, and Jonah Kapena. TRANSLATION OF

The Judiciary Act of 1847, however, established a new judicial system that eviscerated the powers of the Mō‘ī.<sup>302</sup> The creation of the Superior Court of Law and Equity designated William Lee as chief justice thus rendering the all-Hawaiian supreme court symbolic in significance only.<sup>303</sup> In 1850, under the new Constitution prepared primarily by Judge Lee, the Hawaiian-language supreme court led by the Mō‘ī and the Superior Court led by Lee, were both replaced by the Hawai‘i Supreme Court, which was composed of a chief justice and two associate justices.<sup>304</sup>

With regard to the use of ‘Ōlelo Hawai‘i in government, in 1846, the legislature of the Kingdom of Hawai‘i decreed that all laws be published in both the Hawaiian and English languages.<sup>305</sup> For over a decade, the Superior Court and later the Hawai‘i Supreme Court ruled that in situations involving any statutory interpretation issues, or apparent discrepancies between the English and Hawaiian versions, the Hawaiian version would prevail.

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1840 CONSTITUTION, *supra* note 291, at 200. When Kekāuluohi passed away in 1845, Keoni Ana became Kuhina, and the Minister of Interior. 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS, *First Act Kamehameha III* § XXX, at 17 (Honolulu, Gov’t Press 1846) (enacted Oct. 29, 1845) [hereinafter 1845 STATUTE LAWS]; 1 KANAWAI I KAUIA E KA MOI, E KAMEHAMEHA III, KE ALII O KO HAWAII PAE AINA, KANAWAI MUA § 30, at 16 (Honolulu, Mea Pai a Na Misionary Amerika 1846) (enacted Oct. 29, 1845) [hereinafter 1845 KANAWAI]. Then in November of 1844, Joshua Kaeo was selected as an associate justice to replace Z. Ka‘auwai, who was appointed Land Commissioner. *No ke Aupuni*, POLYNESIAN, Nov. 14, 1846, at 3 (“No ka lilo ana, o L. [sic] Kaauwai, i Luna hoona kumu kuleana Aina, ua hoike mai oia i ka Moi i ke ku pono ole ia ia ke hana i kela hana, a me kela hana a ka Lunakanawai kiekie. Nolaia ua ae aku ke Alii ia ia e haalele i kana hano o ka Lunakanawai, a ua halawai ka poe i kohoia e na Makaainana, a ua hoonoioia Josua Kaeo i Lunakanawai kiekie ma ko Kaauwai hakahaku.”).

<sup>302</sup> See generally 1847 STATUTE LAWS, *supra* note 300, at 26–38; 1847 KANAWAI, *supra* note 300, at 26–39.

<sup>303</sup> MERRY, *supra* note 23, at 102–03.

<sup>304</sup> From 1852 to 1892, the newly created Hawai‘i Supreme Court was comprised almost entirely of foreigners—indeed, of the seventeen men who were justices of the supreme court, fifteen were foreigners, one was Hawaiian (John ‘Ī‘Ī), and one was part-Hawaiian (R.G. Davis). *Id.* at 103 (citation omitted); see also WADE WARREN THAYER, A DIGEST OF DECISIONS OF THE SUPREME COURT OF HAWAII vi–ix (1916).

<sup>305</sup> 1845 STATUTE LAWS, *supra* note 300, ch. 1, art. 1, § 5, at 23 (enacted Apr. 27, 1846) (“The director of the government press shall promulgate the laws enacted by the legislative council . . . in the official organ, both in the Hawaiian and English languages.”); 1845 KANAWAI, *supra* note 300, mok. 1, haa. 1, § 5, at 19 (enacted Apr. 27, 1846) (“Pono i ua Puuku Pai palapala nei no ke Aupuni, e hoolaha aku i na Kanawai a ka Pocahaolelo e hooholo ai. . . . Penei oia e hana ai, e pai no ma ka olelo Hawaii, a me ka olelo Enelani . . .”).

For example, in the 1856 case *Metcalf v. Kahai*,<sup>306</sup> an issue arose over a statutory provision relating to the proper assessment of damages to an owner of a trespassing animal.<sup>307</sup> Justice George Robertson concluded that in a dispute involving the English and Hawaiian versions of a law, the Hawaiian version prevailed:

Ua ikeka ka like ole o ka olelo Hawaii a me ka olelo Beritania ma kekahi kanawai, a ua hilinai ka Aha mamuli o ka olelo Hawaii.<sup>308</sup>

Where there appeared a discrepancy between the Hawaiian and English versions of a statute, the Court adhered to the former.<sup>309</sup>

Justice Robertson acknowledged that it had historically been the practice of the court to recognize the Hawaiian version of the law and thus, the court should “conform to it in this instance.”<sup>310</sup>

A few months later, Chief Justice Lee reaffirmed this holding in *Hardy v. Ruggles*,<sup>311</sup> which involved conflicting procedural requirements for filing documents with the office of the Registrar of Conveyances.<sup>312</sup> In *Hardy*, the parties all acknowledged that English was “their mother tongue,”<sup>313</sup> but nonetheless argued over the conflicting language contained in the English and Hawaiian versions of laws.<sup>314</sup> In interpreting the Hawaiian version of

<sup>306</sup> 1 Haw. 225 (Haw. Kingdom 1856).

<sup>307</sup> *Id.* at 226.

<sup>308</sup> *Metcalf v. Kahai* (1856) in NA OLELO HOOHOLO O KA AHA KIEKIE O KO HAWAII PAE AINA, MA KE KANAWAI, KAULIKE, HOOKO KA UOHA, A ME KA AHA MOANA, *supra* note 285, at 75 (syllabus). Specifically, the Hawaiian version of the court’s decision stated in pertinent part:

Ua like ole ka olelo Beritani me ka olelo Hawaii, o keia pauku. Ma ka olelo Beritania, ua oleloia e hooukuia ka pa-ha o ka poho i loa, a pino paha; a ma ka olelo Hawaii, ua oleloia e hooukuia ka mea holoholona e like me ka mea kupono no ka poho a me ka pino i loa.

*Id.* at 77.

<sup>309</sup> *Metcalf*, 1 Haw. at 226 (syllabus). The court stated in pertinent part as follows:

The decision of the case depends, chiefly, upon the construction of certain portions of the statutes relating to estrays . . . There is a discrepancy in this section between the English and Hawaiian versions. The former provides that the owner of the animals shall pay, four times the amount of damage done, or of value destroyed; the latter provides that he shall pay, a fair and reasonable amount of compensation for the loss and damage sustained.

*Id.* (emphases omitted).

<sup>310</sup> *Id.*

<sup>311</sup> 1 Haw. 255 (Haw. Kingdom 1856).

<sup>312</sup> *Id.* at 255–56.

<sup>313</sup> *Id.* at 258–59.

<sup>314</sup> The English version required that all documents be stamped prior to being filed with the Bureau of Conveyances. *Id.* at 257. The Hawaiian version did not contain this

the statute, the court acknowledged the difficulties involved with translation insofar some words are “very broad and indefinite in their meaning, having no corresponding word in the English language, but, on the contrary, as being capable of answering to a hundred different words in the English language . . . .”<sup>315</sup>

To reconcile any conflicts, however, Chief Justice Lee stated, “[W]here there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country. This doctrine was first laid down by the Superior Court in 1848, and has been steadily adhered to ever since.”<sup>316</sup> Chief Justice Lee stated that in situations where a meaning is “obscure, or the contradiction slight,” Hawaiian and English may be used to “help and explain each other.”<sup>317</sup>

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requirement. *Id.* At issue before the court was the definition of the words, “na palapala hoolilo waiwai lewa.” *Id.* at 257–58. The court determined that the proper translation of the section referred to “all bills of sales and conveyances of personal property, &c, &c.” *Id.* at 258. The court provided a lengthy explanation as to how it arrived at this conclusion. *See id.*

<sup>315</sup> *Id.* at 258.

<sup>316</sup> *Id.* at 259. Chief Justice Lee obliquely references an early Superior Court case as one example—he could be referencing *Shillaber v. Waldo*, 1 Haw. 21 (Haw. Kingdom Super. Ct. 1847), but the dates do not match.

<sup>317</sup> *Hardy*, 1 Haw. at 259 (“The English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight, but in a case like the present, where the omission in the Hawaiian is clear, it is impossible to reconcile them . . . .”). *But cf.* *Haalelea v. Montgomery*, 2 Haw. 62, 69 (Haw. Kingdom 1858) (clarifying that in cases where the Hawaiian version is “merely a translation” of an original document, the English will govern).

For example, in *Naone v. Thurston*, 1 Haw. 220 (Haw. Kingdom 1856), the Hawai'i Supreme Court analyzed the meaning of “proportional share” using both the Hawaiian and English versions of the statutes. *Id.* at 221. Defendant argued that “proportional share” should be construed as “a precisely equal share . . . .” *Id.* The court framed the issue as: “Does the language used in the Constitution sustain [Defendant's] argument?” *Id.* In citing the Hawaiian version of the Constitution, the court noted that the translated words for “proportional share,” in Hawaiian are “*ke kau wahi hapa kupo*.” *Id.* The court concluded that neither the English nor the Hawaiian version could be construed as “a precisely equal share.” *Id.*

According to ‘Ōiwi attorney and Hawaiian language scholar Paul Nahoa Lucas, “[t]he Supreme Court’s legitimization of Hawaiian as the dominant language . . . was short-lived.”<sup>318</sup> “English-mainly” advocates<sup>319</sup> successfully lobbied the Hawaiian legislature<sup>320</sup> and on May 17, 1859 a new law was enacted, reversing over a decade of judicial precedent:

PAUKU 1493. Ina i ikeia i kekahi manawa, ua kue loa ka olelo Beretania a me ka olelo Hawaii, iloko o keia kanawai, alaila, e paa no ka olelo Beritania.<sup>321</sup>

SECTION 1493. If at any time a radical and irreconcilable difference shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding.<sup>322</sup>

In 1865, section 1493 was reenacted as a new law because the 1859 version applied only to the “Civil Code of 1859.” The statutory language was amended to provide as follows:

PAUKU I. Ina ua ikeia i kekahi manawa, ua kue loa ka olelo Beritania ma ka olelo Hawaii, iloko o na kanawai o keia Aupuni i kauia a e kau ia ana paha ma keia hope aku, alaila, e paa no ka olelo Beritania.<sup>323</sup>

SECTION 1. That whenever shall be found to exist any radical and irreconcilable difference between the English and Hawaiian version of any of the laws of the Kingdom, which have been, or may hereafter be enacted, the English version shall be held binding.<sup>324</sup>

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<sup>318</sup> Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ‘Ōlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAWAIIAN J. HIST. 1, 4 (2000).

<sup>319</sup> *Id.* at 2–4 (explaining that by 1850, English had largely become the language of business, diplomacy, and to a large extent, the government—a trend that was welcomed by supporters of the “English-mainly” campaign).

<sup>320</sup> According to scholars Maenette K.P. Benham and Ronald H. Heck, “While the legislature consisted of both Native Hawaiian and White representatives, the majority of Hawaiians were educated by the missionary, thereby swaying government decisions toward dominant colonial activity.” MAENETTE K.P. BENHAM & RONALD H. HECK, *CULTURE AND EDUCATIONAL POLICY IN HAWAII: THE SILENCING OF NATIVE VOICES* 50 (1998).

<sup>321</sup> O NA KANAWAI KIVILA O KO HAWAII PAE AINA, HOHOLOIA I KA MAKAHIKI 1859, mok. XLI, § 1493, at 268 (Honolulu, n. pub. 1859).

<sup>322</sup> THE CIVIL CODE OF THE HAWAIIAN ISLANDS PASSED IN THE YEAR OF OUR LORD 1859, Ch. XLI, § 1493, at 367 (Honolulu, n. pub. 1859).

<sup>323</sup> Act of Jan. 10, 1865, E Hoomaopopo Ai i ke Ano o na Kanawai Ina ua Kue ka Olelo Beritania me ka Olelo Hawaii, *in* NA KANAWAI O KA MOI KAMEHAMEHA V., KE ALII O KO HAWAII PAE AINA I KAUIA E KA HALE AHAOLELO, ILOKO O KA AHAOLELO O NA MAKAHIKI 1864–65, at 66–67 (Honolulu, n. pub. 1865).

<sup>324</sup> Act of Jan. 10, 1865, Construction of Statutes Where the English and Hawaiian Versions Do Not Agree, *in* LAWS OF HIS MAJESTY, KAMEHAMEHA V., KING OF THE HAWAIIAN ISLANDS, PASSED BY THE LEGISLATIVE ASSEMBLY AT ITS SESSION 1864–1865, at 68

In 1892, a particularly contentious case, *In re Ross*,<sup>325</sup> came before the Hawai'i Supreme Court. The case involved a petition to annul an election of Nobles for the division of O'ahu because the Minister of the Interior allegedly illegally refused to print the "descriptive parts" of the ballots in Hawaiian.<sup>326</sup> The court stated:

[T]he statute laws of this Kingdom have been and will continue to be passed and promulgated in two versions, English and Hawaiian. But, though this may be the case, the two versions constitute but one act. There is no dual legislation. As a rule one version is the translation of the other. The effort is always made to have them exactly coincide, and the legal presumption is that they do.<sup>327</sup>

This statement seemingly contradicted the court's previous acknowledgment of the complexities involved in interpreting and translating the subtle nuances contained in the Hawaiian language.<sup>328</sup> Indeed, the court's statement in *In re Ross* illustrated a trend toward de-emphasizing the Hawaiian language.<sup>329</sup> In a sense, if both versions were legally intended to correspond exactly,<sup>330</sup> what purpose would it serve to

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(Honolulu, n. pub. 1865) (emphasis added).

<sup>325</sup> 8 Haw. 478 (Haw. Kingdom 1892).

<sup>326</sup> *Id.* at 479. Specifically, the ballots were purportedly illegal because: they did not contain any of the words "Koho ana no ka makahiki 1892," nor any Hawaiian words specifying the name of the office, or the name of the division for Nobles, or the term of the office, nor, in the cases of the special elections, any words in the Hawaiian language specifying the unexpired terms of the office, nor the words "Koho Balota Kuikawa," but that all of said Hawaiian words were omitted therefrom, as appears by a specimen of said ballots appended to and made a part of the petition. More succinctly, the ballot is averred to be illegal because its descriptive parts were not printed in Hawaiian.

*Id.*

<sup>327</sup> *Id.* at 480.

<sup>328</sup> *Cf.* Hardy v. Ruggles, 1 Haw. 255, 258 (Haw. Kingdom 1856) (acknowledging the inherent difficulty in reconciling conflicting statutory provisions between the Hawaiian and English version).

<sup>329</sup> *See Ross*, 8 Haw. at 480.

<sup>330</sup> The concept that "one version is the translation of the other," and that it is even possible to have two versions "exactly coincide" is an overly simplistic view that we continue to see in modern times—indeed, many in the legal community today view legal translation as "merely a simple and straightforward mechanical process, akin to an administrative function . . ." Stella Szantova Giordano, Note, *It's All Greek to Me: Are Attorneys Who Engage In or Procure Legal Translation for Their Clients at Risk of Committing an Ethical Violation?*, 31 QUINNIPIAC L. REV. 447, 448 (2013). Moreover, the "conventional understanding of interpretation is that it is a mathematical, formulaic process, whereby a word in one language has an 'exact, corresponding word in another.'" Annette Wong, Note, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic*



have two versions? Eventually, one language would be rendered superfluous in the legislature and the courts. As the Hawai'i Supreme Court noted:

We are aware that, though the Hawaiian language is the original language of this people and country, the English language is largely in use. Of necessity the English language must be largely employed to record transactions of the government in its various branches, because the very ideas and principles adopted by the government come from countries where the English language is in use.<sup>331</sup>

Shortly thereafter in 1893, Queen Lili'uokalani was deposed and the Kingdom of Hawai'i was illegally overthrown.<sup>332</sup> Supporters of the overthrow believed assimilation,<sup>333</sup> which involved the suppression of both Native Hawaiian culture and the Hawaiian language, was "strategically

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and Cultural Differences, 21 S. CAL. REV. L. & SOC. JUST. 431, 435 (2012) (quoting Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1031 (2007)). As noted by one linguist, however,

the translation of legal texts remains a myth, a sublime aim never to be truly achieved. . . . linguistically equivalent legal notions will frequently have different contents in different jurisdictions, [and] . . . [a]s a result, the question in legal translation is not which translation is right, but, much more modestly, which one is less wrong.

Giordano, *supra*, at 449 (quoting Uwe Kischel, *Legal Cultures—Legal Languages*, in TRANSLATION ISSUES IN LANGUAGE AND LAW 7 (Frances Olsen et al. eds., 2009)).

As just one example, courts in Hawai'i have grappled with problems in legal translations over seemingly straight-forward terms like "father." In *Makila Land Co. v. Kapu*, 114 Haw. 56, 156 P.3d 482 (Haw. Ct. App. 2006), Judge Burns presided over an appeal from summary judgment that involved a complaint to quiet title. *Id.* at 58, 156 P.3d at 484. The parties disputed the translation of a phrase, "kuu makuakane." *See id.* at 60, 156 P.3d at 486.

<sup>331</sup> *Ross*, 8 Haw. at 480.

<sup>332</sup> Aupuni Kuikawa, Aha Hooke a me Komite Kuka, Kuahaua (Jan. 17, 1893) (on file at the Hawaiian Historical Society) (announcing in 'Ōlelo Hawai'i, *inter alia*, that the Hawaiian monarchy is abrogated); Provisional Government, Executive Council and Advisory Council, Proclamation (Jan. 17, 1893) (on file at the Hawaiian Historical Society).

<sup>333</sup> The "assimilation" strategy had previously been explicated by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Johnson*, Native Americans were denied the right to own property, in part due to their "failure" to assimilate to Anglo-American culture. *Id.* at 589–90, 604–05. According to Chief Justice Marshall, assimilation of the "objects of the conquest" was necessary insofar "to govern them as a distinct people, was impossible . . . they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." *Id.* at 589–90. Assimilation of the "objects of conquest" are usually "incorporated with the victorious nation . . . The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people." *Id.*

necessary to prevent a countercoup and to secure Hawai'i a protected status under the United States."<sup>334</sup>

After the overthrow, in the continental United States, debates raged in Congress and in the press over the constitutionality of acquiring overseas territories such as Hawai'i, Puerto Rico, and the Philippines.<sup>335</sup> Much of the controversy centered around the argument "that these territories were different: far off, not contiguous to the continent, densely populated, unamenable to colonization by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government."<sup>336</sup> Some Americans argued that the annexation of Hawai'i was contrary to their interests describing the inhabitants of Hawai'i as a "variegated agglomeration of the fag-ends of humanity."<sup>337</sup> Specifically, Native Hawaiians were described as an "insouciant, indolent creature" that "lag[ged] superfluous on the scene" both "intellectually and industrially."<sup>338</sup> One bombastic comment asked how Americans could "endure their shame" if a Senator from Hawai'i proceeded to use "pidgin English" to "chop logic" with fellow politicians.<sup>339</sup>

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<sup>334</sup> Kamanaonāpalikūhonua Souza & K. Ka'ano'i Walk, *Ōlelo Hawai'i and Native Hawaiian Education*, in *NATIVE HAWAIIAN LAW: A TREATISE*, *supra* note 2, at 1270; see also ALBERT J. SCHÜTZ, *THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES* 350–51 (1994).

<sup>335</sup> Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 *REVISTA JURIDICA U.P.R.* 225, 237–38 (1996).

<sup>336</sup> *Id.*

<sup>337</sup> 31 CONG. REC. 6189 (daily ed. June 21, 1898) (statement of Sen. Mitchell). Specifically:

The Hawaiian is an insouciant, indolent creature. With him a longing for repose is a gift of nature. He is more inclined to aesthetics than to ethics. He delights in flowers that grow without cultivation, in listening to music, and in seeing other people dance. Intellectually and industrially he lags superfluous on the scene. After a century's contact with civilization his race has dwindled from 400,000 to 40,000. The white man has stamped out his religion, his traditions. His lands have slipped away from him. He no longer has a voice in the Government. It does not lie in human nature for him to be friendly to the white man, and he would prove a permanent menace to our Government.

*Id.*

<sup>338</sup> *Id.*

<sup>339</sup> 31 CONG. REC. 5790 (daily ed. June 11, 1898) (statement of Sen. Clark)

Thus, the “English-mainly campaign transformed into an English-only one” and proponents ramped up their effort to further “Americanize” the population.<sup>340</sup> As stated in 1893 by Reverend Charles McEwen Hyde:

Hawaiian is still the language of the Legislature and the judiciary, and every biennial period the attempt is made to make the Hawaiian, not the English language, the authoritative language of the statute book. The Americanization of the islands will necessitate the use of the English language only as the language of business, of politics, of education, of church service . . . .<sup>341</sup>

To effectuate their goals, English-only advocates focused their attention on education, seeking to instill these principles upon the next generation of native speakers.<sup>342</sup> In 1896, a law was enacted requiring that English be used as the exclusive medium of instruction in all public and private schools.<sup>343</sup> As posited by numerous scholars, the devastating impact of this law nearly resulted in the cultural extermination of Native Hawaiians.<sup>344</sup> Moreover, it had the desired political impact that the English-only proponents sought: annexation could be more swiftly secured.<sup>345</sup>

In 1898, the U.S. Hawaiian Commission, which was appointed after annexation to make recommendations on a territorial government for Hawai‘i, concluded that the laws requiring compulsory attendance at schools, and the law mandating that English be taught exclusively, “[wa]s the most beneficial and far-reaching in unifying the inhabitants which could

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<sup>340</sup> See Lucas, *supra* note 318, at 8 (describing it as an effort to accelerate the extermination of the Hawaiian language).

<sup>341</sup> C.M. HYDE, STATEMENT OF APR. 3, 1893, H. EXEC. DOC. NO. 53-47 (1893), *as reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII 821, 825 (1895).

<sup>342</sup> See Lucas, *supra* note 318, at 8.

<sup>343</sup> Act of June 8, 1896, ch. 57, § 30 (codified in 1897 Haw. Comp. Laws § 123) (“The English language shall be the medium and basis of instruction in all public and private schools . . . Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.”).

<sup>344</sup> See generally Lucas, *supra* note 318, at 9–10; SCHÜTZ, *supra* note 334, at 352–56 (explaining that due to this 1896 law, the number of Hawaiian medium schools dropped drastically from 150 in 1880 to zero in 1902—the result was that by 1917, no child under the age of 15 could properly speak their mother tongue). Other authors provide a thorough overview of the historic and current legal struggles for those involved in the fight for the revitalization of ‘Ōlelo Hawai‘i. See, e.g., L. Kaipoleimanu Ka‘awaloa, *Translation v. Tradition: Fighting for Equal Standardized Testing ma ka ‘Ōlelo Hawai‘i*, 36 U. HAW. L. REV. 487, 487–90 (2014); Ka‘ano‘i Walk, “Officially” What? *The Legal Rights and Implications of ‘Ōlelo Hawai‘i*, 30 U. HAW. L. REV. 243, 243–48 (2007).

<sup>345</sup> And indeed, annexation came two years later in 1898. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. RES. 55, 55th Cong., 30 Stat. 750 (1898).

be adopted . . . . No system could be adopted which would tend to Americanize the people more thoroughly than this.”<sup>346</sup> Two years later, Congress passed an Organic Act establishing Hawai'i's territorial government.<sup>347</sup>

The Organic Act provided in pertinent part that in the Territory of Hawai'i, “[a]ll legislative proceedings shall be conducted in the English language.”<sup>348</sup> In 1904, U.S. Representative Jonah Kūhio Kalaniana'ole introduced a bill making both “English and Hawaiian languages official languages in legislative proceedings of the Territory of Hawaii for the period of ten years.”<sup>349</sup> The bill, which was heavily criticized by some Native Hawaiians,<sup>350</sup> failed to pass and English became the sole language used in legislative proceedings in Hawai'i.<sup>351</sup> However, the territory continued to promulgate all laws enacted by the legislature in ‘Ōlelo Hawai'i and English until 1943.<sup>352</sup> In that year, a Senate committee report explained that it was no longer necessary to publish laws in Hawaiian and English because “the use of English ha[d] been so generally established.”<sup>353</sup> The report further claimed that because “many of the terms in modern legislation have no equivalent in the Hawaiian language, a translation is misleading.”<sup>354</sup> Implicit within these legislative pronouncements was the

<sup>346</sup> THE REPORT OF THE HAWAIIAN COMM'N, S. DOC. NO. 16–55, at 10 (1898).

<sup>347</sup> Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) [hereinafter Hawai'i Organic Act].

<sup>348</sup> *Id.* § 44, 31 Stat. at 148.

<sup>349</sup> H.R. Res. 15226, 58th Cong. (1904). The bill stated in pertinent part:

Whereas many citizens of Hawaii of the Hawaiian race have been educated in the Hawaiian language and are familiar with the elements of constitutional government, American institutions and history without being able to read, write, and speak the English language understandingly; Whereas nearly all Hawaiians under middle age have been educated in the English language: . . . *Be it enacted*. . . That for the period of ten years . . . both the English and Hawaiian languages may be used as official languages in the legislative proceedings of said Territory in so far as the same may be necessary to an intelligent transaction of the business thereof, at the expiration of which time English shall be the sole official language.

*Id.*

<sup>350</sup> See, e.g., *Republican Meeting: At the Wailuku Skating Rink*, MAUI NEWS, Oct. 22, 1904, at 3. Representative Kalaniana'ole explained as follows: “I introduced a bill to carry the request in effect according to your wishes, but now my enemies are accusing me to trying to abolish the Hawaiian language entirely. I did no such thing.” *Id.*

<sup>351</sup> See REVISED LAWS OF HAWAII 1905, 1915, 1925, ch. 2 § 2; 1943 Haw. Sess. Laws ch. 218, § 1 (requiring the promulgation of laws in English—Hawaiian was not mentioned).

<sup>352</sup> 1943 HAW. SESS. LAWS ch. 218, § 1.

<sup>353</sup> S. REP. NO. 328, 22d Terr. Sess. (1943) (Standing Comm.), reprinted in 1943 HAW. SEN. J. 825, 826.

<sup>354</sup> *Id.*

categorization of the Hawaiian language as a relic—a dead language unable to keep up with the times.

In modern times, questions relating to the utilization of ‘Ōlelo Hawai‘i in our legal system have generally been met with concerns about costs and “judicial economy.” Recent legislative attempts, for example, to appropriate funds to establish long-term Hawaiian language resources for the Judiciary have failed.<sup>355</sup> And while some Kānaka ‘Ōiwi have successfully used ‘Ōlelo Hawai‘i in court,<sup>356</sup> others have not been so fortunate. For example, in *Tagupa v. Odo*,<sup>357</sup> the court denied a plaintiff’s request to provide his deposition testimony in Hawaiian, explaining thusly, “the mere fact that Hawaiian is also an official language of Hawai‘i” does not mean we can “ignore the practical realities” involved in obtaining a Hawaiian language interpreter as it “is an unnecessary expense that would needlessly complicate and delay” the judicial process.<sup>358</sup>

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<sup>355</sup> In recent times, the Hawai‘i State Judiciary has made commendable efforts to correct the omission of the Hawaiian language from the judicial system. *See, e.g.*, H.R. Con. Res. 217, 28th Sess. (Haw. 2015) (creating Hawaiian Language Web Feasibility Task Force to determine whether the Judiciary’s website could be translated into ‘Ōlelo Hawai‘i); OFFICE OF THE C.J. SUP. CT., REPORT TO THE TWENTY-EIGHTH LEGISLATURE 2016 REGULAR SESSION ON HOUSE CONCURRENT RESOLUTION 217, HOUSE DRAFT 1, SENATE DRAFT 1: REQUESTING THE JUDICIARY TO CONVENE A TASK FORCE TO EXAMINE ESTABLISHING HAWAIIAN LANGUAGE RESOURCES FOR THE STATE OF HAWAI‘I JUDICIARY, H.R. Con. Res. 217, 28th Sess., at 25 (Dec. 2015) (acknowledging that Hawai‘i has a commitment to the perpetuation of the Hawaiian language but recognized that there could be some potential community opposition due to the use of State resources for a task that arguably serves only a small portion of the population); *see also supra* notes 271–77 and accompanying text. These efforts, however, have largely been stymied due to financial barriers. For example, in 2016, the Judiciary submitted testimony in “strong support” of Senate Bill 2162, which sought to appropriate funds to establish long-term Hawaiian language resources for the Judiciary. *Hearing on S.B. 2162 Before the H. Comm. on Jud.*, 28th Sess. (Haw. 2016) (testimony of Judge Richard Bissen). Senate Bill 2162 was referred to the committee on Finance on March 24, 2016, but was never acted upon.

<sup>356</sup> *See, e.g.*, Jennifer Sinco Kelleher, *Telescope Protestor Found Not Guilty After Trial in Hawaiian*, HAW. TRIBUNE HERALD (Jan. 9, 2016), <http://hawaii.tribune-herald.com/news/local-news/telescope-protester-found-not-guilty-after-trial-hawaiian>; *Even Without Interpreter, Hawaiian Judge Brings a Message*, NPR WEEKEND EDITION SUNDAY (Nov. 29, 2015), <http://www.npr.org/2015/11/29/457756725/even-without-interpreter-hawaiian-judge-brings-a-message>.

<sup>357</sup> 843 F. Supp. 630 (D. Haw. 1994).

<sup>358</sup> *Id.* at 631.

As it stands then, other than a few “token phrases,”<sup>359</sup> the use of ‘Ōlelo Hawai‘i is largely symbolic and mostly excluded from the current legislative and judicial system. Similarly, we see this omission reflected in current scholarship and legal histories written about Native Hawaiians. The correlation between law and language is not readily apparent, but by unearthing the records contained in law’s archive, we see embedded in its statutes, precedents, and legislative history, a hidden narrative that silently shaped the dominant discourse that we see today—a discourse that glaringly omits Native Hawaiian voice.

Indeed, for those who fail to probe law’s archive, it may be difficult to readily ascertain that for a period of time, primary legal sources were in ‘Ōlelo Hawai‘i—the original language used by the courts and the legislature. Over time, we also see reflected in law’s archive the political motivations that led to the direct suppression of ‘Ōlelo Hawai‘i. Assimilation was necessary so annexation could be secured.

What has also been largely obscured, however, is the correlation between law’s historical sanctioning of English as the “official version” in court decisions and legislative enactments, and the hegemonic practice that we see today that relies solely on the “English version” of events. Indeed, law has concealed its role in devaluing Hawaiian language sources as a credible source of knowledge. Only by interrogating law’s archive do we recognize the implicit message conveyed: “Why bother looking at the Hawaiian version, when the English version is a direct translation?” Moreover, if there is a conflict, the laws explicitly provide that the English version “trumps” the Hawaiian version. This devaluing of ‘Ōlelo Hawai‘i, and the sanctioning of the English version as being accurate and representative of Hawaiian thought has led many scholars to believe that there is no need to ascribe to certain professional standards (*i.e.*, learn the language, use primary sources, etc.) that should be so evident when writing about another culture.

Some might question the underlying harm in utilizing English-only sources. How can it really be harmful? A “fact” is a “fact” no matter who says it, right? As described below in Section III.E., this is a dangerous proposition to subscribe to, especially if one proceeds without critically evaluating the source. Moreover, as demonstrated in Judge Burns’ article, the problem with this misguided belief is that it produces a one-sided (and

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<sup>359</sup> As noted by Judge Richard Bissen, “To give life and validation to Hawai‘i’s co-official language, the Task Force urged in its report that the use of ‘Ōlelo Hawai‘i in State and local government must be broader than token phrases, more accessible in everyday life, and equally valid as the use of English.” *Hearing on S.B. 2162 Before the H. Comm. on Jud.*, 28th Sess. 1 (Haw. 2016) (testimony of Judge Richard Bissen).

at times false) version of history that has caused devastating repercussions for Native Hawaiians. Thus, the question isn't, "how bad is it if I rely on English-only sources?" But rather, "what kind of irreparable harm will be perpetuated by employing these one-sided research methods?"

*E. A Case in Point: Kuykendall, the Oligarchy Newspapers, and Dole's Assault on the Opposition Media*

Mai lilo 'oe i puni wale, o lilo 'oe i kamali'i.

Do not believe all that is told to you lest you be led as a little child.  
Do not be gullible; scan, weigh, and think for yourself.<sup>360</sup>

When memory failed and written records were falsified—when that happened, the claim of the Party to have improved the conditions of human life had got to be accepted, because there did not exist, and never again could exist, any standard against which it could be tested.

—George Orwell<sup>361</sup>

Imagine a future world where historians relied primarily on Fox News<sup>362</sup> and Breitbart News<sup>363</sup> to gather research about societal and political issues

<sup>360</sup> See PUKUI *supra* note 7, at 266 n.2077.

<sup>361</sup> GEORGE ORWELL, 1984, at 93 (1961).

<sup>362</sup> Fox News advertises itself as providing, "Fair and Balanced news"—indeed, Fox News trademarked the phrase "Fair and Balanced" in 1998 to describe its news coverage, and it even went so far as to file a lawsuit to protect the use of the phrase by satirists who allegedly "blur[red] and tarnish[ed] it." Susan Saulny, *In Courtroom, Laughter at Fox and a Victory for Al Franken*, N.Y. TIMES (Aug. 23, 2003), <http://www.nytimes.com/2003/08/23/nyregion/in-courtroom-laughter-at-fox-and-a-victory-for-al-franken.html> (referring to *Fox News Network v. Penguin Grp. (USA)*, No. 03-CV-06162 (S.D.N.Y. 2003)); see, e.g., *Politics Fair and Balanced*, FOX NEWS, <http://video.foxnews.com/playlist/americas-newsroom-politics-fair-and-balanced/> (last visited Apr. 23, 2017).

The Fox News Channel, sometimes dubbed the "Faux News Channel," has been the subject of intense scrutiny by some journalists "because of the fact that at least part of what it foists upon the viewer is not real news but false news." ANTHONY COLLINGS, *CAPTURING THE NEWS: THREE DECADES OF REPORTING CRISIS AND CONFLICT* 154 (2010). "Fox regularly distorts the elements of news reports, inflating anything that makes Republicans look good and Democrats look bad, and minimizing to the point of near-invisibility anything that makes Republicans look bad and Democrats look good." *Id.*

<sup>363</sup> Breitbart News is a far-right news website whose "influence grew out of a proud and aggressive rejection of the mainstream." Callum Borchers, *How Breitbart Could Lose Its Alt-Right Street Cred*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/how-breitbart-could-lose-its-alt-right-street-cred>. Since Breitbart chairman Stephen K. Bannon became senior White House advisor for President

occurring in modern times in the United States. In our hypothetical future, anchors and talk show hosts would certainly provide future historians with interesting insights. For example, on January 3, 2013, Fox News television host Bill O'Reilly stated that while he loves Hawai'i as a vacation destination, he has trouble understanding why Hawai'i is so "liberal" despite how many Asians, who "are not liberal by nature, usually more industrious and hardworking," live in that state.<sup>364</sup>

A cursory review of some of the headlines published by Fox and Breitbart suggests they were written by and for a particular segment of American society: *Climate Change: The Hoax that Costs Us \$4 Billion a Day*,<sup>365</sup> *The Solution to Online Harassment Is Simple: Women Should Log Off*,<sup>366</sup> *World Health Organization Report: Trannies 49 XS Higher HIV Rate*,<sup>367</sup> *Racist, Pro-Nazi Roots of Planned Parenthood Revealed*.<sup>368</sup>

In October 2014, the Pew Research Center released a study that was part of a year-long effort to shed light on political polarization in America.<sup>369</sup>

Donald Trump, however, it is being described by its own writers as an "influential, now-mainstream publication." *Id.* Breitbart describes the alternative right, also known as the alt-right, as "a movement born out of the youthful, subversive, underground edges of the internet that "delight[] in attention-grabbing juvenile pranks." Allum Bokhari & Milo Yiannopoulos, *An Establishment Conservative's Guide to the Alt-Right*, BREITBART (Mar. 29, 2016), <http://www.breitbart.com/tech/2016/03/29/an-establishment-conservatives-guide-to-the-alt-right/>.

<sup>364</sup> Media Matter Staff, *O'Reilly: "Asian People Are Not Liberal, You know, By Nature. They're Usually More Industrious and Hard-Working,"* MEDIA MATTERS FOR AM. (Jan. 3, 2013), <http://mediamatters.org/video/2013/01/03/oreilly-asian-people-are-not-liberal-you-know-b/192015> (providing transcript and news clip from *The O'Reilly Factor* show that originally aired on January 3, 2013).

<sup>365</sup> Fox News republished this article that originally came from Breitbart's website. *Climate Change: The Hoax that Costs Us \$4 Billion a Day*, FOX NEWS (Aug. 10, 2015), <http://nation.foxnews.com/2015/08/10/climate-change-hoax-costs-us-4-billion-day> (citing James Delingpole, *Climate Change: The Hoax That Coasts Us \$4 Billion a Day*, BREITBART (Aug. 8, 2015), <http://www.breitbart.com/big-government/2015/08/08/climate-change-the-hoax-that-costs-us-4-billion-a-day/>).

<sup>366</sup> Milo Yiannopoulos, *The Solution to Online Harassment Is Simple: Women Should Log Off*, BREITBART (July 5, 2016), <http://www.breitbart.com/milo/2016/07/05/solution-online-harassment-simple-women-log-off/>.

<sup>367</sup> Austin Ruse, *World Health Organization Report: Trannies 49 Xs Higher HIV Rate*, BREITBART (Dec. 2, 2015), <http://www.breitbart.com/big-government/2015/12/02/world-health-organization-report-trannies-49-xs-higher-hiv-rate/>.

<sup>368</sup> John Nolte, *Racist, Pro-Nazi Roots of Planned Parenthood Revealed*, BREITBART (July 14, 2015), <http://www.breitbart.com/big-government/2015/07/14/racist-pro-nazi-roots-of-planned-parenthood-revealed/>.

<sup>369</sup> AMY MITCHELL ET AL., *POLITICAL POLARIZATION & MEDIA HABITS: FROM FOX NEWS TO FACEBOOK, HOW LIBERALS AND CONSERVATIVES KEEP UP WITH POLITICS*, PEW RESEARCH



The study revealed that “[w]hen it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust. And whether discussing politics online or with friends, they are more likely than others to interact with like-minded individuals . . . .”<sup>370</sup>

The study found that those who expressed as “consistently conservative” were “tightly clustered around a single news source, far more than any other group in the survey, with 47% citing Fox News as their main source for news about government and politics.”<sup>371</sup> The study also noted that “consistent conservatives” express “greater distrust” of most sources measured in the survey” however, at the same time, “88% of consistent conservatives trust Fox News.”<sup>372</sup> In contrast, those who identified as “consistently liberal” were “less unified in their media loyalty,” relying “on a greater range of news outlets . . . .”<sup>373</sup> Notably, 81% of “consistent liberals” distrusted Fox News.<sup>374</sup> In short, for the “consistently conservative” and the “consistently liberal,” there are “stark ideological differences” both in the news sources that they use, as well as in their awareness of and trust in those sources.<sup>375</sup> These statistics demonstrate that America’s political polarization is reflected in the media that they use and trust.

If issues like these persist in modern times, it should not be difficult to recognize that such political partisanship existed in nineteenth-century Hawai‘i. And indeed, it did. Thus, I urge all legal scholars and practitioners who seek to write histories about Native Hawaiians to carefully reflect upon our professional standards and aspire to portray more than the Fox News and Breitbart version of events. To be clear, I do not advocate that these types of sources be omitted—I assert, however, that such viewpoints cannot, and should not be the only viewpoints relied upon if one truly seeks to present a “balanced” history.

As described in Part II above and bears repeating here: (1) a scholar is urged towards an “inquiry devoted to the discovery of truth”; (2) students and practitioners are expected to know how to locate relevant legal authority, and how to critically evaluate it; (3) practitioners must be mindful

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CTR., 8 (2014), <http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-10-21-2014.pdf>.

<sup>370</sup> *Id.* at 1.

<sup>371</sup> *Id.* at 2.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 5, 15–16.

<sup>375</sup> *Id.* at 11.

to not distort the evidentiary record, or ignore evidence that is damaging to his client's position; (4) an "objective historian" must, *inter alia*, treat sources with appropriate reservations, must weigh the authenticity of accounts, and consider the motives of actors.

As it relates to Hawai'i history, it is easy to overlook the necessity of critically examining sources that are a mainstay for scholars. For example, in Judge Burns' article, he extensively quotes (306 words spanning pages 228 through 229) and cites to volumes two and three of Ralph S. Kuykendall's *The Hawaiian Kingdom*<sup>376</sup> in 14 footnotes.<sup>377</sup> Judge Burns is not alone in his use of this source. Indeed, this detailed three-volume history about Hawai'i has been cited by the U.S. Supreme Court,<sup>378</sup> the Hawai'i Supreme Court,<sup>379</sup> the U.S. District Court for the District of Hawai'i,<sup>380</sup> and it can also be found in the Federal Register,<sup>381</sup> various U.S.

<sup>376</sup> RALPH S. KUYKENDALL, 2 THE HAWAIIAN KINGDOM 1854–1874: TWENTY CRITICAL YEARS (1953) [hereinafter 2 KUYKENDALL]; RALPH S. KUYKENDALL, 3 THE HAWAIIAN KINGDOM 1874–1893: THE KALAKAUA DYNASTY (1967) [hereinafter 3 KUYKENDALL]. Volume one, which was not cited by Judge Burns, is frequently cited by various legal sources. *See, e.g.*, sources cited *infra* notes 378–84 and accompanying text (citing RALPH S. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 1778–1854: FOUNDATION AND TRANSFORMATION (1938) [hereinafter 1 KUYKENDALL]).

<sup>377</sup> Burns, *supra* note 6, at 225 nn.60–62, 226 n.72, 227 nn.74–77, 228 n.83, 229 nn.84–87, 230 nn.89–90.

<sup>378</sup> *See* Rice v. Cayetano, 528 U.S. 495, 500–01, 504 (2000) (first citing FUCHS, *supra* note 141, at 4; then citing 1 KUYKENDALL, *supra* note 376, at 3, 27; and then citing 3 KUYKENDALL, *supra* note 376, at 344–72). The Court stated as follows:

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. *The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources.*

*Id.* at 499–500 (emphasis added). Law's archive continues to perpetuate a one-sided discourse now enshrined as the so-called "history" for Native Hawaiians. *See generally* Andrade, *supra* note 31, at 642–57 (examining *Rice v. Cayetano* and the Court's willingness to ignore, erase, and revise history to ensure the integrity of its decisions).

<sup>379</sup> *See, e.g.*, McBryde Sugar Co. v. Robinson, 55 Haw. 260, 271, 275, 277, 286, 294, 517 P.2d 26, 33, 35, 36, 41, 45 (1973) (citing 1 KUYKENDALL, *supra* note 376, at 288–89; 3 KUYKENDALL, *supra* note 376, at 62–70); Pub. Access Shoreline Haw. v. Haw. Cty. Plan. Comm'n, 79 Haw. 425, 444, 903 P.2d 1246, 1264 (1995) (citing 1 KUYKENDALL, *supra* note 376, at 73, 137–38, 153, 208, 214), *cert. denied*, 517 U.S. 1163 (1996).

<sup>380</sup> *See, e.g.*, Reece v. Island Treasures Art Gallery, Inc., 468 F. Supp. 2d 1197, 1199–

Congressional documents,<sup>382</sup> court briefs,<sup>383</sup> and a plethora of law reviews and journals.<sup>384</sup>

Attorney Paul M. Sullivan, who has penned several law review articles, referred to Kuykendall's work as "[p]erhaps the single most valuable resource"<sup>385</sup> for those involved in examining the history of Hawai'i's government "in the mid-nineteenth century, when Hawai'i was evolving almost overnight from a neolithic culture under a feudal absolute monarchy into a modern constitutional government."<sup>386</sup> Thus, Kuykendall's work has been sanctioned and enshrined by law's archive as *the* preeminent source on Native Hawaiian history.

Because Judge Burns almost exclusively relied on volume 3 of Kuykendall's work, this article critically analyzes and evaluates the sources cited in that particular volume. This was a somewhat daunting task insofar Kuykendall's 764-page tome contained a total of 1,879 endnotes.<sup>387</sup> As

1200 (D. Haw. 2006) (citing 1 KUYKENDALL, *supra* note 376, at 10–11); Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1148 (D. Haw. 2003) (citing 1 KUYKENDALL, *supra* note 376, at 3), *aff'd in part, rev'd in part* 416 F.3d 1025 (9th Cir. 2005), *and rev'd in part on reconsideration*, 470 F.3d 827 (9th Cir. 2006) (en banc)).

<sup>381</sup> *E.g.*, Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278, 71,279–80, 71,309 (first citing 1 KUYKENDALL, *supra* note 376; then citing 1 KUYKENDALL, at 258–60; then citing 3 KUYKENDALL, *supra* note 376, at 582–605; then citing 1 KUYKENDALL, *supra* note 376, at 360–62; and then citing 1 KUYKENDALL, *supra* note 376, 227–41).

<sup>382</sup> *See, e.g.*, DEP'T OF INTERIOR, NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 320 (1983) (prepared pursuant to Native Hawaiians Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 (1980)) (citing 3 KUYKENDALL, *supra* note 376, at 347, 348, 348 n.\*, 348–49, 349 n.\*, 351–52, 703 n.9, 704 n.27); *see also* Andrade, *supra* note 31, at 680–81 (explaining how the Commission "drew significantly" from Kuykendall's work).

<sup>383</sup> *See, e.g.*, Amicus Curiae Brief of Abigail Kinoiki Kekaulike Kawananakoa in Support of Respondents at 11, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (No. 07-1372), 2009 WL 230935, at \*11 (citing 3 KUYKENDALL, *supra* note 376, at 374).

<sup>384</sup> *See, e.g.*, Christopher D. Hu, *Transplanting Servitude: The Strange History of Hawai'i's U.S.-Inspired Contract Labor Law*, 49 STAN. J. INT'L L. 274, 279, 280, 281, 289, 290 (2013) (citing 1 KUYKENDALL, *supra* note 376, at 236, 261, 268, 319–28, 329, 330; 2 KUYKENDALL, *supra* note 370, at 186, 191); *cf.* Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771, 784, 784 n.52 (2006) (citing and discussing 1 KUYKENDALL, *supra* note 376) (recognizing that modern scholarship has taken an "interpretative turn away from praising the process of colonization" embedded in historical works like Kuykendall's *The Hawaiian Kingdom*).

<sup>385</sup> Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 100 n.4 (1998).

<sup>386</sup> *Id.* at 100.

<sup>387</sup> Moreover, some endnotes contained multiple citations, thus raising the total number

Professor Osorio stated, "I don't know a single historian of the Hawaiian Islands who has not depended on the painstaking and detailed study of government documents, foreign exchanges, and letters that Kuykendall collected, organized, and incorporated into his massive three-volume chronicles between 1938 and 1967."<sup>388</sup> Nonetheless, as he further explained, "I also cannot think of a single one of us who would depend on his histories as definitive nor as dependable interpretations of culture, or even believable explanations of change."<sup>389</sup>

As described by Professor Kanalu Young, Kuykendall was "contracted by the civilian occupation authority of the 1930s to write the definitive history of these Islands."<sup>390</sup> Like many other scholars of his generation, Kuykendall believed that "history was properly the objective study of written primary sources meticulously researched in archival and library locations far removed from where the stories are told as palpable, emotion-filled oral accounts."<sup>391</sup> As Young explains, this methodology meshed well with the political agenda advanced by those who hired Kuykendall, insofar the "political objective of US civilian authority" since 1898 was to "sanitize the Hawaiian national past, its precursors, and the oral and written record that did exist."<sup>392</sup> This was largely necessary because it was "damaging to the foundation mythologies of the so-called territorial administration."<sup>393</sup> Moreover:

Institutional racism of that era set the groundwork to preclude any resurgent nationalism on the part of Hawaiian subjects based on ulterior political motives to maintain hegemony and absolute social control. The recognition of the native Hawaiian intellect rooted in good part in the traditionalism of the ancients had to be recast. The evidence was often reframed and intentionally marginalized.<sup>394</sup>

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of citations to well over 2,000. Spreadsheets tracking individual citations were necessary to categorize sources.

<sup>388</sup> Osorio, *supra* note 211, at 192.

<sup>389</sup> *Id.*; see also *id.* at 195 (criticizing, *inter alia*, Kuykendall's portrayal of the ordinary Hawaiian voter and politician as "dimly perceptive of their weakened position").

<sup>390</sup> Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1778–2001*, 2 HAW. J. L. & POL. 1, 24 (2006); see 3 KUYKENDALL, *supra* note 376, at v.

<sup>391</sup> Young, *supra* note 390, at 24.

<sup>392</sup> *Id.*

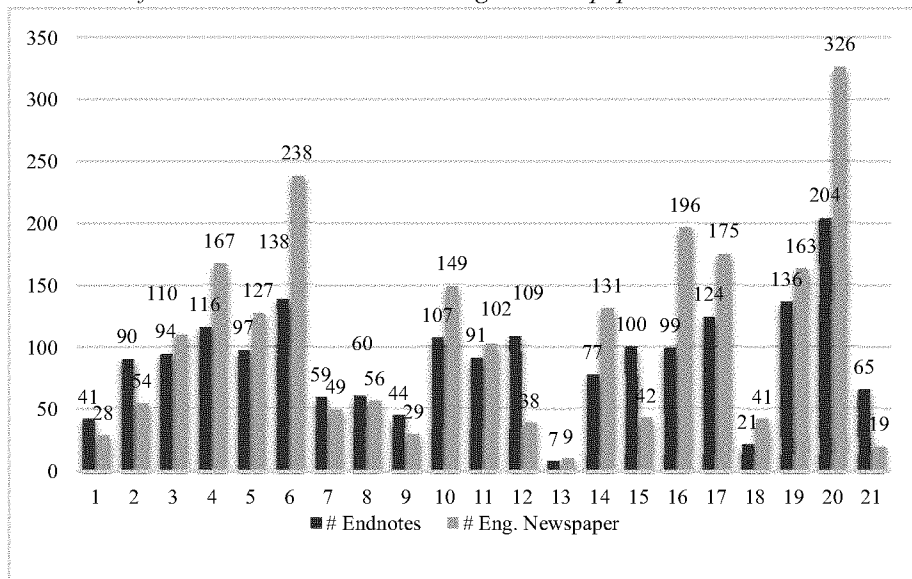
<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 24–25.

Whether it was intentional or not, Kuykendall selected sources that not only marginalized Native Hawaiian voice, but sharply criticized that voice as “weak” or “thrifless.”

In Kuykendall’s “References” he stated, “[t]his book is based mainly on manuscript sources and contemporary newspapers.”<sup>395</sup> It is Kuykendall’s prodigious use and reliance on newspapers that forms the basis of my analysis here. Indeed, Kuykendall’s heavy-handed use of newspapers to establish “historical facts” is evident in his endnotes: of the 1,879 endnotes contained in volume three, Kuykendall cited approximately 2,249 times to English language newspapers.<sup>396</sup> Table 3 below displays by chapter, a comparison of the total number of endnotes with the total number of citations to English-only newspapers.

*Table 3: Analysis by Chapter: Total Number of Citations Compared to Total Number of Citations to Establishment English Newspapers.*



<sup>395</sup> 3 KUYKENDALL, *supra* note 376, at 651.

<sup>396</sup> Kuykendall’s endnotes were systematically reviewed to analyze each individual citation to a particular newspaper. *Id.* at 652–747. Some citations contained a single reference to a newspaper, but cited multiple publication dates—for example, “*Hawaiian Gazette*, Aug. 30, Sept. 13, 1876; *Pacific Commercial Advertiser*, Sept. 16, Oct. 14, 1876.” Each publication date counted as an individual citation to the particular newspaper—as such, in the provided example, there are two citations to the *Hawaiian Gazette* and two citations to the *Pacific Commercial Advertiser*. Although every effort was made to accurately count each individual citation in Kuykendall’s bibliography, some mistakes in computation may have occurred. A spreadsheet was created to track newspaper citations for each chapter.

In contrast, Kuykendall provided only a smattering of references to translated sources that were authored by 'Ōiwi,<sup>397</sup> or translated sources that originally appeared in 'Ōlelo Hawai'i.<sup>398</sup> Using the most generous, over-inclusive measure for calculating the total number of Hawaiian-based sources cited or described in an endnote by Kuykendall still results in a meager 101 citations.<sup>399</sup> This is in stark contrast to the 2,249 citations to English language newspapers—incredibly, newspapers account for only one of the many types of English language sources that Kuykendall referenced in his endnotes. Hundreds of other English language citations were referenced by Kuykendall which include archival materials from a variety of institutions.<sup>400</sup> Table 4 depicts the total number of 'Ōiwi citations per chapter as compared to the total number of citations made to English language newspapers. In most chapters, Kuykendall references 'Ōiwi sources, perhaps once or twice.<sup>401</sup> In six chapters, Kuykendall makes no reference at all.<sup>402</sup>

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<sup>397</sup> Kuykendall references English language translations for some sources. See, e.g., *id.* at 689 n.8 (citing EDWARD K. LILIKALANI, MOVE! EXCEL THE HIGHEST!: THE CELEBRATED LILIKALANI MANIFESTO OF THE ELECTION CAMPAIGN OF FEBRUARY, 1882 (H.L. Sheldon trans., Honolulu, n. pub. 1882)).

<sup>398</sup> Kuykendall referenced either: (1) an English language translation, (2) or an English language article that was published in the following Hawaiian language newspapers *Nuhou*, *Lahui Hawaii*, *Ka Elele Poakolu*, *Ka Leo o ka Lahui*. Ironically, the English language translations for articles that were originally published in Hawaiian were often published in Establishment papers—so the underlying probity of those translations might be at issue.

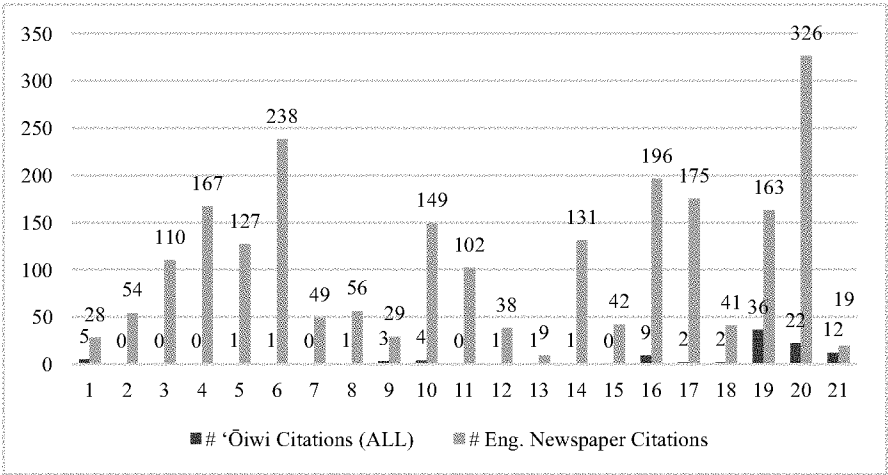
<sup>399</sup> Some might argue that my calculations are too generous. For example, none of Kuykendall's citations actually reference Hawaiian language documents—indeed, he often references translations of articles that were published in English language newspapers. In Chapter 5, Kuykendall references *Lahui Hawaii* in endnote 19: "The *Gazette* of March 29 prints a translation of a very interesting article from the Hawaiian language newspaper *Lahui Hawaii* objecting to further expenditure of public funds for bringing in Chinese laborers." 3 KUYKENDALL, *supra* note 376, at 670 n.19. Similarly, in Chapter 10, endnote 6, Kuykendall references a translation of an article originally published in *Elele Poakolu*. *Id.* at 689 n.6.

<sup>400</sup> *Id.* at 651 (referencing sources from various repositories such as the Hawaiian Historical Society, the Library of Congress, British Public Record Office, U.S. Department of State Archives, etc.).

<sup>401</sup> See *supra* Table 4.

<sup>402</sup> *Id.*

Table 4: Analysis by Chapter: Total Number of ‘Ōiwi Citations as Compared to Total Citations Made to Establishment English Language Newspapers



Entirely omitting native voice, while purporting to write histories about Native Hawaiians, is part of the inherent problem with Kuykendall’s work. But more importantly, the English language sources that Kuykendall does rely upon are highly contentious as well.

1. *The English newspapers that spoke for the oligarchy: how the establishment press shaped history*

According to historian Helen Chapin, in Hawai‘i, “[b]etween 1834 and 2000, approximately 1,250 separately titled papers have appeared in print.”<sup>403</sup> Hawai‘i is unique insofar our papers likely “represent[] the most diverse press in the world.”<sup>404</sup> Kuykendall’s third volume covers the time period from 1873 through 1893.<sup>405</sup> During that era, approximately 79 different newspapers were printed in various languages including ‘Ōlelo Hawai‘i, English, Chinese, Japanese, and Portuguese.<sup>406</sup> Approximately

<sup>403</sup> HELEN G. CHAPIN, GUIDE TO NEWSPAPERS OF HAWAI‘I: 1834–2000, at 1 (2000).  
<sup>404</sup> *Id.*  
<sup>405</sup> 3 KUYKENDALL, *supra* note 376, at 3. Although Kuykendall’s book title states that it covers the time-period commencing in 1874, Chapter 1 begins in the latter part of 1873.  
<sup>406</sup> CHAPIN, *supra* note 403, at 129–32. I created a spreadsheet to calculate this number using Helen Chapin’s *Guide to Newspapers of Hawai‘i*, which lists published newspapers by date. Again, this number is an approximation due to the range in publishing dates for each newspaper.

48% of the newspapers were in 'Ōlelo Hawai'i, while only 20% of the newspapers were published in English.<sup>407</sup>

Despite the diversity available, Kuykendall relied primarily on three English language newspapers: *The Hawaiian Gazette* (403 citations), *The Daily Bulletin* (767 citations), and *The Pacific Commercial Advertiser* (941 citations).<sup>408</sup> In other words, of the total 2,249 citations to English newspaper articles, 2,111 of those citations (or 94% of the citations), came from these newspapers.<sup>409</sup>

By using Chapin's *Guide to Newspapers of Hawai'i* as a starting point to critically assess the "viewpoints" contained in these English language papers, I ascertained that all of these newspapers—especially toward the latter part of the nineteenth-century—represented the views of what she referred to as the "establishment papers."<sup>410</sup> According to Chapin, the establishment papers exemplified "the controlling interests of a town or city, region or country" but did not always "represent the majority of people."<sup>411</sup> Instead, the establishment papers represented a "part of a power structure that formulate[d] the policies and practices to which everyone [wa]s expected to adhere."<sup>412</sup> In Hawai'i, the establishment press was introduced by the American Protestant Mission, which promoted American culture and values in Hawaiian and English languages.<sup>413</sup> Their ascent to power was described by Chapin:

Almost immediately after their arrival, members of the tiny [missionary] group from New England became advisors to the Hawaiian monarchy. As the English language gained dominance through the century, so, too, did establishment papers in English gain even greater power. By the end of the century, an alliance of missionary descendants and haole (Caucasian) American business interests, operating as an oligarchy, backed up by the American military, and aided and abetted by the oligarchy's newspapers, overthrew the queen and the Hawaiian government representing the majority population.<sup>414</sup>

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<sup>407</sup> Approximately 38 newspapers were published in 'Ōlelo Hawai'i, and 16 newspapers were published in English. See *id.*

<sup>408</sup> See *supra* note 396.

<sup>409</sup> *Id.*

<sup>410</sup> CHAPIN, *supra* note 403, at 1; HELEN G. CHAPIN, SHAPING HISTORY: THE ROLE OF NEWSPAPERS IN HAWAII 2–3 (1996).

<sup>411</sup> CHAPIN, *supra* note 410, at 2.

<sup>412</sup> *Id.* at 3.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*



During the time period represented in Kuykendall's third volume, population statistics illustrate that the establishment papers had a very small audience. According to census records, the total population in 1872 was 56,897, and Hawaiians and part-Hawaiians comprised just over 90% of the population.<sup>415</sup> Nearly 4% of the population was Chinese and 1% was Portuguese.<sup>416</sup> Thus, the purported audience (U.S. and European) of the "establishment press" was comprised of just less than 4% of the total population.<sup>417</sup> By 1890, the total population in Hawai'i was 88,990.<sup>418</sup> Hawaiians and part-Hawaiians comprised 45% of the population, nearly 33% of population were Asian (Chinese and Japanese), 14% were Portuguese, and a small percentage of the population were designated as "other."<sup>419</sup> Thus, as Chapin confirmed, "the establishment-official press spoke for no more than 5- or 6-percent of the population."<sup>420</sup>

The English language newspapers that Kuykendall relied on most heavily (94% of the total 2,249 citations) were infamous for espousing particularly anti-monarchical and racist sentiments. Helen Chapin and Ronald Williams have carefully analyzed the history of these newspapers, and I summarize the salient points below.<sup>421</sup>

To begin, the three newspapers most frequently cited by Kuykendall were all produced, in whole, or in part, by editor and publisher Henry M. Whitney.<sup>422</sup> It bears noting that Whitney's abhorrence of Hawaiians and native culture was evident in his editorials where he condemned the practice of "pagan" hula<sup>423</sup> and discussed the general inferiority of Hawaiians.<sup>424</sup> Thus, Kuykendall's reliance on such one-sided sources to

<sup>415</sup> ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAI'I: 1778–1965, at 10 tbl.1, 74 tbl.16 (1968).

<sup>416</sup> *Id.* at 75 tbl.17.

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 74 tbl.16

<sup>419</sup> *Id.* at 75 tbl.17.

<sup>420</sup> CHAPIN, *supra* note 410, at 93.

<sup>421</sup> See generally CHAPIN, *supra* note 403; Williams, *supra* note 261.

<sup>422</sup> CHAPIN, *supra* note 403, at 15, 39, 84–85.

<sup>423</sup> Whitney wrote about the "ruinous influence" of hula: "The fairest girls . . . in their wild, denuded state" appeared and danced with "gestures and posturings indicative of licentious acts, accompanied with music and often with the most vulgar and unchaste songs which the tongue is capable of uttering." PAC. COM. ADVERTISER, Apr. 21, 1859, at 2.

<sup>424</sup> With regard to Native Hawaiians, Whitney once wrote, "Though inferior in every respect to their European or American brethren, they are not to be . . . wholly despised . . . They are destined to be laborers in developing the capital of the country." PAC. COM. ADVERTISER, Mar. 5, 1857, at 2.

describe Native Hawaiian history undercuts any logical assertion that his work is “balanced.”

*The Pacific Commercial Advertiser (PCA)*, which was cited over 900 times by Kuykendall, was originally published to coincide in 1856 with the U.S. observance of the Fourth of July.<sup>425</sup> It was first founded by Whitney who correctly predicted that the *PCA* was “destined to exert more than an ephemeral influence on our community and nation.”<sup>426</sup> As explained by Williams: “After an early existence as both a strong governmental critic and later a publication of the government itself, the influential [*PCA*] came to be controlled and edited by those who were to lead the usurpation of native rule and advocate for the annexation of Hawai'i to the United States.”<sup>427</sup> Thus, except for the short period of time when “Walter Murray Gibson ran it and supported King Kalākaua and his policies, the *PCA* was editorially and in its news columns pro-American and pro-annexation.”<sup>428</sup>

In 1888, W.R. Castle, Henry Castle, and original *PCA* founder Henry Whitney purchased the *PCA*.<sup>429</sup> By that time, the group already owned another significant English language paper, *The Hawaiian Gazette (Gazette)*.<sup>430</sup> The *Gazette* was originally run by the Hawaiian government from 1865–1873, however, “[w]hen King Kalākaua’s views began to diverge from the oligarchy’s after 1873, it became anti-monarchy.”<sup>431</sup> Like the *PCA*, it espoused strong, and often rancorous views that even Kuykendall acknowledged were problematic: “In the forefront of the opposition[<sup>432</sup>] newspaper brigade was the long established *Hawaiian Gazette* which sprinkled many paragraphs of biting sarcasm and ridicule here and there in its long columns of small type, and printed some things which, even if true, might better have been left unsaid.”<sup>433</sup>

<sup>425</sup> CHAPIN, *supra* note 403, at 84–85.

<sup>426</sup> *Id.* Indeed, *The Honolulu Advertiser*, a descendant of the *PCA*, ran until 2010, when it was purchased by rival paper *Honolulu Star-Bulletin*. *Id.* at 45, 85; *About Us*, HONOLULU STAR-ADVERTISER, <http://www.staradvertiser.com/about/> (last visited Apr. 23, 2017) (“The Honolulu Star-Advertiser published its first edition June 7, 2010, combining the best of the 128-year-old Honolulu Start Bulletin and the 154-year-old Honolulu Advertiser.”).

<sup>427</sup> Williams, *supra* note 261, at 75.

<sup>428</sup> CHAPIN, *supra* note 403, at 85.

<sup>429</sup> Williams, *supra* note 261, at 75.

<sup>430</sup> *Id.*

<sup>431</sup> CHAPIN, *supra* note 403, at 39.

<sup>432</sup> Kuykendall refers to them as the opposition newspapers since they opposed King Kalākaua. See 3 KUYKENDALL, *supra* note 376, at 274 n.\*. For example, some opposition papers Kuykendall references are, “*Daily Bulletin, Hawaiian Gazette, Saturday Press*.” *Id.*

<sup>433</sup> *Id.* at 345 (referencing the increasingly bitter attacks made by opposition newspapers against Walter Murray Gibson and King Kalākaua).

Whitney was also responsible for starting *The Daily Bulletin* (*Bulletin*), ancestor of the *Honolulu Star-Bulletin*, and according to Chapin, the first successful daily newspaper.<sup>434</sup> Like the *PCA* and *Gazette*, the *Bulletin* adopted a pro-American, pro-Annexation stance.<sup>435</sup> It should be noted, however, that not all of its journalists shared the same views as its progenitor, Whitney—after the overthrow, Daniel Logan was jailed for expressing criticism of the Provisional Government.<sup>436</sup> Nonetheless, the *Bulletin* received harsh rebukes from Hawaiian newspapers who criticized it as being untruthful. This is evidenced, for example, by various articles published in 1895 that proclaimed, “*Hoopunipuni loa ka Buletina*,” or “The Bulletin Really Lies.”<sup>437</sup>

But it was not just Native Hawaiians who viewed these newspapers with a certain level of distrust. Even among those who pledged loyalty to the Provisional Government, and later the Republic of Hawai‘i, the oligarchy newspapers were viewed with some disdain. For example, the *PCA*—while it was under the leadership of Whitney during the latter part of the nineteenth-century—was sharply criticized by Hawai‘i Supreme Court Chief Justice Albert F. Judd. In an unpublished manuscript, Judd contextualizes the *PCA* as being a newspaper designed to “represent the foreign community of Honolulu.”<sup>438</sup> According to Judd, however, the *PCA* often contained “glaring inaccuracies” that were “as common as correct statements.”<sup>439</sup> Indeed, in its zeal to beat rival papers like the “*Terrafin Express*,” Judd complained that the *PCA* based its reporting on “merely hearing a whisper of something that is said to have occurred, right or wrong, hit or miss . . . .”<sup>440</sup> According to Judd:

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<sup>434</sup> CHAPIN, *supra* note 403, at 15.

<sup>435</sup> *Id.*

<sup>436</sup> The *Bulletin*, when it was headed by “anti-Kalākaua activist” G. Carson Kenyon, it was undoubtedly anti-monarchical. CHAPIN, *supra* note 403, at 78. Lorrin Thurston, who was a missionary descendant and central figure in the illegal overthrow of the Hawaiian monarchy, was an editorial contributor. *Id.*

<sup>437</sup> See, e.g., KA MAKAAINANA, Sepa. 30, 1895, at 8.

<sup>438</sup> Albert F. Judd, Judd Collection (undated) (unpublished manuscript) (on file at the Bishop Museum Archives, MS Group 70, Box 29.3.24). Various scholars have found the Judd collection to contain a wide-range of fascinating materials. See Williams, *supra* note 261, at 77–78 (writing specifically about Judd’s complaint about the *PCA*). Although the manuscript relating to the *PCA* is undated, based on the language contained in the text, it “ties the work definitively to the period in which Henry M. Whitney was the proprietor.” *Id.* at 88 n.17.

<sup>439</sup> Judd, *supra* note 438.

<sup>440</sup> *Id.*

If a newspaper cannot give us the truth, unvarnished facts, without blundering and stupidity, then let it not attempt to instruct its readers. And if the information thence obtained cannot be relied on, better be without the newspaper; for while error is dangerous, truth will find for itself other means of publicity, and perfect silence is much preferable to distorted facts & falsehoods.<sup>441</sup>

Given the historical context of the oligarchy newspapers, it is near impossible to assert that these sources present a balanced understanding of Hawai'i history. "If it is a truism that the powerful write history, so too, do they publish papers."<sup>442</sup> And indeed, as Chapin described, the oligarchy's press continued to dominate in Hawai'i's government and politics until the 1950s.<sup>443</sup>

It was not just the newspapers, however, who controlled the historical narrative that we see today. Indeed, it was Kuykendall, the anointed penultimate Hawai'i historian, who ultimately wielded the most power. Under a guise of objectivity, Kuykendall determined who "won" and "lost"—he was the one who framed the questions to be asked, he made the decisions about what evidence to include and exclude, and finally, he assessed the significance or irrelevance of that evidence.<sup>444</sup>

## 2. *The 1893 Overthrow and Sanford Ballard Dole's war with the opposition newspapers*

Prior to the the overthrow of the Hawaiian monarchy, freedom of the press was guaranteed. Charles De Varigny, a Frenchman who served as a government official in Hawai'i, characterized the mid-nineteenth century as one of complete freedom of expression:

No precedent exists in Hawaii for political repression. Indeed, freedom of the press is so completely accepted as a customary part of political life, a kind of national habit, that intemperate language scarcely excites. Restrictive laws are the prime cause of a dangerous public press; when the political writer runs

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<sup>441</sup> *Id.*

<sup>442</sup> CHAPIN, *supra* note 410, at 3.

<sup>443</sup> *Id.* ("Over two centuries, the establishment press has exercised the dominant influence upon the history of Hawai'i.").

<sup>444</sup> See Reiter, *supra* note 27, at 56 ("[I]t is the *writer* who determines who wins and who loses by setting the questions to be asked, by including and excluding evidence, by defining and assessing significance, in short, by controlling the narrative version of the past that will stand for the fleeting past events.").

no risk of official interference his wildest diatribes remain without effect, for then he is obliged to convince his readers by the cogency of his arguments.<sup>445</sup>

In 1852, freedom of speech was guaranteed in Article 3 of the Hawai'i Constitution which provided: "All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."<sup>446</sup>

And indeed, the press exercised this right most vigorously. Varigny quoted one article published by the *PCA* as an example of "how far liberty of the press was carried, thanks to the government's policy of toleration . . . ."<sup>447</sup> In that article, Varigny remarked, "The violence of [*PCA*'s] language revealed the[ir] impotence . . . . Persons assured of the righteousness of their actions do not threaten in this style."<sup>448</sup>

Similarly, Kuykendall describes the vitriolic attacks on King Kalākaua and his cabinet waged by the establishment/opposition newspapers in 1884.<sup>449</sup> At that time, the *PCA* was pro-monarchy because it was under the leadership of Walter Murray Gibson, who was a leading target of the establishment/opposition newspapers.<sup>450</sup> The *PCA*, in commenting on the defeat of a resolution in the legislature, acknowledged that "'vigorous, healthy Opposition is necessary to good Government,' but suggested that it was now time to let the fires 'die out from under the political pot.'"<sup>451</sup> As Kuykendall explained, however, the opposition papers refused to let things lie, thus the attacks continued unabated.<sup>452</sup>

<sup>445</sup> CHARLES DE VARIGNY, *FOURTEEN YEARS IN THE SANDWICH ISLANDS* 181 (Alfons L. Korn trans., 1981).

<sup>446</sup> HAW. CONST. of 1852, art. III, in *CONSTITUTION AND LAWS OF HIS MAJESTY KAMEHAMEHA III., KING OF THE HAWAIIAN ISLANDS PASSED BY THE NOBLES AND REPRESENTATIVES AT THEIR SESSION 1852* (Honolulu, n. pub. 1852). In 'Ōlelo Hawai'i, it stated, "E hiki no i na kanaka a pau ke olelo, a ke palapala, a ke hoike wale aku paha, i ko lakou manao no na mea a pau, a na ke Kanawai wale no lakou e hooponopono. Aole loa e kaulia kekahi Kanawai e hoopilikia ana, a e keakea ana paha i ka olelo, a me ka paipalapala." HAW. KUMUKANAWAI O KA MAKAHIKI 1852, pauku III, in *HE KUMUKANAWAI A ME NA KANAWAI O KA MOI KAMEHAMEHA III., KE ALII O KO HAWAII PAE AINA I KAUIA E NA ALII AHAOLELO, A ME KA POEIKOHOIA ILOKO O KA AHAOLELO O KA MAKAHIKI 1852* (Honolulu, n. pub. 1852).

<sup>447</sup> VARIGNY, *supra* note 445, at 180.

<sup>448</sup> *Id.* at 181.

<sup>449</sup> 3 KUYKENDALL, *supra* note 376, at 274–75.

<sup>450</sup> CHAPIN, *supra* note 403, at 85.

<sup>451</sup> 3 KUYKENDALL, *supra* note 376, at 274 (first quoting PAC. COM. ADVERTISER, June 30, 1884; and then quoting PAC. COM. ADVERTISER, July 12, 1884).

<sup>452</sup> *Id.*

In 1887, the Bayonet Constitution reestablished the right to freedom of the press by adopting the same language contained in the 1852 Constitution.<sup>453</sup> Ironically, while the reigning ali'i might have afforded the press with the unfettered right to freedom of speech—regardless of viewpoints or political affinity—these same rights were severely curtailed under the Provisional Government. As Chapin explained, “[a]n establishment press, protective of itself, however, sometimes betrays the cause of press freedom. In the 1890s, Native Hawaiians, who had fervently adopted the Jeffersonian belief, learned a bitter lesson—the oligarchy’s press claimed freedom for itself but strenuously denied it to others.”<sup>454</sup>

The overthrow of the Hawaiian monarchy occurred on January 17, 1893<sup>455</sup> and as noted by Chapin, journalists who were political activists chose sides:

Those who plotted the overthrow of the queen formed the Provisional Government and Republic of Hawai'i until annexation could be secured. In effect, they led a combined establishment-official press, for they controlled the government and the economics of Hawai'i. Those dedicated to preserving Hawai'i as an independent country formed the opposition. It was they who led a Hawaiian nationalist press that challenged the annexationists.<sup>456</sup>

On the same day, the right of the writ of habeas corpus was suspended and martial law was imposed.<sup>457</sup> Within days of the overthrow, the Executive and Advisory Councils of the Provisional Government began summoning certain journalists for questioning. For example, on January 24, 1893, President Sanford B. Dole interrogated John G.M. Sheldon,<sup>458</sup> Ōiwi editor

<sup>453</sup> CONSTITUTION OF THE HAWAIIAN ISLANDS, SIGNED BY HIS MAJESTY KALAKAUA, art. III (Honolulu, Hawaiian Gazette Co. 1887); KUMUKANAWAI O KO HAWAII PAE AINA I KAKAU INOA IA E KA MOI KALAKAUA, pauku III (Honolulu, Hawaiian Gazette Co. 1887).

<sup>454</sup> CHAPIN, *supra* note 410, at 5.

<sup>455</sup> Aupuni Kuikawa, Aha Hooko a me Komite Kuka, Kuahaua (Jan. 17, 1893) (on file at the Hawaiian Historical Society) (announcing in ‘Ōlelo Hawai‘i, *inter alia*, that the Hawaiian monarchy is abrogated); Provisional Government, Executive Council and Advisory Council, Proclamation (Jan. 17, 1893) (on file at the Hawaiian Historical Society) (proclaiming abrogation of monarchy and establishment of Provisional Government).

<sup>456</sup> CHAPIN, *supra* note 410, at 93.

<sup>457</sup> Provisional Government, Executive Council and Advisory Council, Order No. 2 (Jan. 17, 1893) (on file at the Hawaiian Historical Society); Aupuni Kuloko, Kauoha Helu 2 (Jan. 17, 1893) (on file at the Hawaiian Historical Society).

<sup>458</sup> Sheldon, who was “half native and half white,” had worked as an editor and writer for over twenty years. See *Affidavit of John G.M. Sheldon, In re G. Carson Kenyon* (Nov. 2, 1895), in CORRESPONDENCE BETWEEN THE GOVERNMENT OF THE REPUBLIC OF HAWAII AND HER BRITANNIC MAJESTY’S GOVERNMENT IN RELATION TO THE CLAIMS OF CERTAIN BRITISH SUBJECTS ARRESTED FOR COMPLICITY IN THE INSURRECTION OF 1895 IN THE HAWAIIAN

of *Hawaii Holomua*, for publishing an article that was purportedly “full of poetical allusions” that tended to “incite the public to disorder” and encouraged “hostility to [the Provisional Government’s] plans.”<sup>459</sup> Dole, who was purportedly fluent in Hawaiian,<sup>460</sup> correctly surmised that the article had a deeper meaning.<sup>461</sup> Sheldon’s article, written in ‘Ōlelo Hawai‘i and titled, “*IMUA O KA LAHUI MAI HAWAII A KAUAI!!*,” employed the use of kaona—a highly complex practice of subtext, veiling and layering of meaning.<sup>462</sup> Kaona has been described as the “language of symbols” that Hawaiians used and within which meaning could be concealed.<sup>463</sup> Throughout the nineteenth-century, Hawaiians used kaona as a means to conceal communication among Native Hawaiians to express loyalty to the Hawaiian Kingdom, “while under the surveillance of the colonially imposed government.”<sup>464</sup>

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ISLANDS 137 (Honolulu, Hawaiian Gazette Co. 1899). He was the son of Henry Sheldon, who was also a journalist and editor. *Id.*

<sup>459</sup> 1893 Executive & Advisory Councils (Sheldon Investigation), at 4 (Jan. 1893) [hereinafter Sheldon Investigation Transcript] (on file at the Hawai‘i State Archives). Sheldon was questioned due to an article he published in *Hawaii Holomua*. See *id.* (referring to John G.M. Sheldon, *Imua o ka Lahui mai Hawaii a Kauai!!*, HAW. HOLOMUA, Jan. 23, 1893, at 2).

<sup>460</sup> See David C. Farmer, *The Legal Legacy of Sanford Ballard Dole*, 6 HAW. B.J. 24, 24 (2002). But, he likely lacked the cultural fluency to definitively understand the underlying message contained in the newspaper article. This is because, even assuming one can read and translate ‘Ōlelo Hawai‘i, a culturally literate interpretation of these types of sources are necessary. See Noelani Arista, *I ka Moolelo Nō ke Ola: In History There Is Life*, 14 ANGLISTICA (SPECIAL ISSUE NO. 2) 15, 17 (2010).

<sup>461</sup> By using a “kaona conscious historical method” as an interpretative tool, it allows us to not only properly evaluate latent messages contained in ‘Ōiwi texts, it also guides us in questioning the “validity of monoperspectival Euro-American interpretations of contact, colonization, and resistance.” Arista, *supra* note 11, at 668 (explaining that a “kaona conscious historical method” is necessary as a means for interpreting sources premised on Hawaiian ways of thinking and speaking).

<sup>462</sup> BRANDY NĀLANI MCDUGALL, FINDING MEANING: KAONA AND CONTEMPORARY HAWAIIAN LITERATURE 5–6 (2016). The term kaona is defined as “[h]idden meaning, as in Hawaiian poetry; concealed reference, as to a person, thing, or place; words with double meanings that might bring good or bad fortune.” PUKUI & ELBERT, *supra* note 2, at 130.

<sup>463</sup> GEORGE HU‘EU SANFORD KANAHELE, KŪ KANAKA: STAND TALL—A SEARCH FOR HAWAIIAN VALUES 47 (1986).

<sup>464</sup> MCDUGALL, *supra* note 462, at 25; see also SILVA, *supra* note 23, at 8. As such, the use of kaona within Hawaiian nationalist texts during the nineteenth-century demonstrates how political claims were embedded and used as a form of coded resistance.

Sheldon, who wisely understood the gravity of the situation he faced, was circumspect in his answers to Dole. Dole first demanded that Sheldon read the article in English.<sup>465</sup> As to be expected, Sheldon gave a summarized version, softening or glossing over some of the language that he read aloud.<sup>466</sup> Sheldon's translation ended with the following line: "We must at all times obey the laws of the Provisional Government, we must obey them without interfering . . . and give them your good opinion as long as it consists and they wait with our prayers, whom God will see who is right."<sup>467</sup>

Dole then asked Sheldon what was "the main purpose" of the article.<sup>468</sup> Sheldon responded, "I wanted that article to go forth to the people to tell them to keep quiet and obey the orders of the new Government and pray to God."<sup>469</sup> Dole responded, "Pray to God for what?"<sup>470</sup> Sheldon started to answer but was interrupted by another question from Dole, "Why all this poetical language?"<sup>471</sup> Sheldon simply stated, "That is newspaper talk."<sup>472</sup> Dole then gave a lengthy speech sharply rebuking Sheldon:

Well now. Mr. Sheldon, we are not in this Provisional Government for fun . . . . We do not expect everybody to agree with us, but we insist that no one shall act with any hostility to us, because it tends to make trouble, it tends to make breaches of . . . the peace, it tends to make disorder. And we have notified the newspapers that we will not tolerate anything in the way of inciting the people. The Queen has been put off the throne . . . . You and the other newspaper men will run your papers recognizing the Provisional Government . . . . We do not think it is proper for you to instill in the minds of the people that the Queen is a Sovereign in the position to say what she wants . . . . And we expect the newspapers, if they wish to continue, to recognize the situation fully . . . . We are not the censors of the press, but, under the circumstances, we shall not tolerate any incitement to disorder or to support any authority against ourselves. I do not know that you have done so, but it seems to some of us that this article full of poetical allusions is in that direction.<sup>473</sup>

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<sup>465</sup> Sheldon Investigation Transcript, *supra* note 459, at 1.

<sup>466</sup> *Id.* at 1–3. It is beyond the scope of this article to describe the embedded kaona contained in the original article. I encourage readers to look for themselves.

<sup>467</sup> *Id.* at 3.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 3–4.



While Dole claimed that the Provisional Government did not seek to “censor the press,” the chilling effect of subsequent actions taken against journalists arguably said otherwise. On January 30, 1893, Act 8 entitled, “An Act Concerning Seditious Offenses,” was promulgated by the Executive and Advisory Councils of the Provisional Government.<sup>474</sup> The law made it a misdemeanor to publish, verbally or otherwise, “any words or any document with a seditious intention.”<sup>475</sup> A “seditious intention” was defined as,

an intention to bring into hatred or contempt, or to excite disaffection against the Provisional Government of the Hawaiian Islands, or the laws thereof, or to excite the people to attempt the alteration by force of any matter established by the laws of the Provisional Government, or to raise discontent or disaffection against the Provisional Government, or to promote feelings of ill-will and hostility between different classes of people in the Hawaiian Islands.<sup>476</sup>

The punishment was hard labor for not more than two years or by fine of up to one-thousand dollars.<sup>477</sup> One day later, on January 31, 1893, the historically pro-American, pro-Annexation newspaper *Bulletin* commented on the severity of this law:

The Bulletin has no policy to be construed into one “to bring into hatred or contempt, or to excite disaffection against the Provisional Government of the Hawaiian Islands . . . .” It does, however, insist on the right to criticize the acts or the policy of the Government, in the interest of liberty equal to that guaranteed under the laws of the United States and Great Britain . . . . The passage and promulgation of severe and stringent laws for purposes already covered by existing legislation . . . in a country with the semblance of freedom, we hold to be an excess of authority. . . and [people are] moved to inquire with bated breath as to what next may be expected in the way of repressive enactments.<sup>478</sup>

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<sup>474</sup> Act of Jan. 30, 1893, in LAWS OF THE PROVISIONAL GOVERNMENT OF THE HAWAIIAN ISLANDS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS: ACTS 1 TO 86 (Honolulu, Robert Grieve Steam Book & Job Printer 1894).

<sup>475</sup> *Id.* at 20.

<sup>476</sup> *Id.* at 20–21.

<sup>477</sup> *Id.* at 21.

<sup>478</sup> DAILY BULL., Jan. 31, 1893, at 2.

The following day, the editor of the *Bulletin*, Daniel Logan, was summoned to appear before the Executive and Advisory Councils.<sup>479</sup> It was evident that under Dole's regime, no one would be spared—any journalist who espoused views that were critical of the Provisional Government could be hauled in for questioning. Logan was interrogated about a number of points made in the *Bulletin*, particularly criticism lobbed at certain measures enacted that curtailed the freedom of the press: "A third aggressive measure establishes a press censorship only surpassed by that of Russia in oppressive possibilities from the fact that an appeal to a jury is still left open to journalists who may be deprived of liberty for exercising the right of legitimate criticism."<sup>480</sup> After reading this passage aloud, Dole, who was formerly a Hawai'i Supreme Court Justice, stated: "I do not understand why an appeal to a jury does not modify this instead of increasing it . . . . To compare a law of that kind with any law of Russia, I think it shows a slight upon your part or a willingness to construe things unfavorably."<sup>481</sup>

Dole continued to question Logan on specific points contained in this article. For example, Dole objected to the following passage: "During the whole of the two years which have elapsed under the Queen's rule never has there been such extravagance, political favoritism or distribution of spoils to the victors as during these fourteen days."<sup>482</sup> Logan was then asked to provide a "definition of spoils."<sup>483</sup> After some exchange, Logan asserted that he should be given some consideration for "weeding out" "everything of a news nature" that was "simply spiteful."<sup>484</sup> Moreover, in defense of the *Bulletin*, Logan carefully maintained:

The "Bulletin" has always held that whenever the country should be unable to govern itself the United States should have the first claim on it. . . . And we have kept up that policy, and I don't think we ought to be censured very strictly for simply making a party fight, of course we will be just as loyal as anybody.<sup>485</sup>

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<sup>479</sup> 1893 Executive & Advisory Councils (Logan Investigation), at 1 (Feb. 1893) (on file at the Hawai'i State Archives). Logan was questioned about a particular article that was published in the *Bulletin*. See *id.* (referring to *The Course of Events*, DAILY BULL., Jan. 31, 1893, at 2).

<sup>480</sup> *Id.* at 3 (quoting *Bulletin* article).

<sup>481</sup> *Id.* at 3–4.

<sup>482</sup> *Id.* at 6 (quoting *Bulletin* article).

<sup>483</sup> *Id.*

<sup>484</sup> *Id.* at 7.

<sup>485</sup> *Id.*

It is relevant that even within the oligarchy-controlled papers, some editors and journalists like Logan felt compelled to speak out against the oppressive measures that the Provisional Government had enacted.

Sheldon, who refused to cave in to the mounting pressure exerted by Dole, continued to publish various articles in both ‘Ōlelo Hawai‘i and English that showed support for independence. Indeed, a few short days after being interrogated by Dole, an unauthored article (likely penned by Sheldon) appeared in the *Holomua*. The article began poetically with a quote from Sir Walter Scott, “Breathes there a man with soul so dead, Who never to himself hath said, This is my own my native land.”<sup>486</sup> The article adamantly insisted that “[n]ot a single Hawaiian . . . desire[d] to see any foreign flag replace his own.”<sup>487</sup> No Hawaiian was “willing to barter his whole national life, tradition, . . . the land of his birth, even in exchange for the proud privilege of becoming a citizen of the greatest republic on earth.”<sup>488</sup> Other articles authored by Sheldon expressed similar sentiments, but when articulated in ‘Ōlelo Hawai‘i, conveyed a stronger underlying message intended for an ‘Ōiwi audience. To accomplish this dangerous task, Sheldon skillfully employed the use of kaona in poems that he composed and published in various newspaper articles. For example, on January 25, 1893, Sheldon published the following poem entitled *Ke Kuokoa Puka La*—his original text appears on the left, and my translation is on the right.<sup>489</sup>

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<sup>486</sup> HAW. HOLOMUA, Jan. 26, 1893, at 4.

<sup>487</sup> *Id.* (emphasis omitted). The article further stated: “Not a single Hawaiian, however, even those few whose signatures to annexation petitions (not 200 in number and mostly convicts) have been bought or forced by necessity from them, desires to see any foreign flag replace his own. And these Hawaiians are 40,000 strong, with 10,000 voters among them.”

<sup>488</sup> *Id.*

<sup>489</sup> Kahikina Kelekona, *Ke Kuokoa Puka La*, HAW. HOLOMUA, Jan. 25, 1893, at 2. Sheldon’s name in ‘Ōlelo Hawai‘i was Kahikina Kelekona. The name of the poem, *Ke Kuokoa Puka La*, was probably in reference to *Ka Nupepa Puka La Kuokoa me Ko Hawaii Pae Aina i Huiia*. This paper, which listed Whitney as one of its famous editors, began publishing on January 26, 1893. See CHAPIN, *supra* note 403, at 82. Sheldon’s message in this poem to Native Hawaiians was thus unmistakable.

He malihini, hoi keia, E auwana hele ae nei, Aihemu manienie, Ai uhini o ka nahele.	This is indeed a newcomer, Wandering hither and thither, Devouring and driving everything away, Like a cloud of locusts consuming the forest.
O ke ano iho la no ia, Malimali i kinohou, A ku ae i ka moku, Ko-we-iu Kanaka.	That is indeed its nature, At first obsequious speech urging reformation, And then they rule the land, Go away you Kanaka.
O ko lakou ano iho la ia, O hoolilo aina ma, Mai punihei aku, I ka mali hoohui aina.	That is their nature, Those who will transfer the land, Do not be deceived, By the honey-coated speech of the annexationists.

On February 15, 1893, Sheldon wrote a scathing article criticizing pro-Annexationist Lorrin Thurston.<sup>490</sup> In response to Thurston's bold assertion that foreigners would be forced to leave Hawai'i if the Queen were reinstated, Sheldon countered, "He lies! and he knows it. The laws of Hawaii made by the foreigners themselves are a sufficient protection for life and property of any stranger who makes this fair land his home."<sup>491</sup> According to Sheldon, Thurston's true concern was that if Hawai'i was ruled by the Queen, Hawai'i could not be "used as a milking cow for him and his party to fill their coffers at the expense of the natives . . . ."<sup>492</sup>

That same day, Dole issued a Warrant of Arrest that demanded Sheldon, "to show cause why he should not be punished for contempt."<sup>493</sup> A writ of habeas corpus was issued upon the petition of G.C. Kenyon, editor of *Hawaii Holomua*.<sup>494</sup> Sheldon's counsel, C.W. Ashford, alleged that the warrant was invalid and insufficient because: (1) the Executive and Advisory Councils of the Provisional Government had no power to authorize the issuance of a warrant, (2) the warrant was insufficient because

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<sup>490</sup> HAW. HOLOMUA, Feb. 15, 1893, at 4.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> Various newspapers reported on the arrest and subsequent proceedings. See, e.g., *Contempt of Council: Proceedings in the Case of the Holomua Editor*, DAILY BULLETIN, Feb. 16, 1893, at 3; *Frear Sustained—Sheldon Returned to Marshal's Care*, HAWAIIAN GAZETTE, Apr. 4, 1893, at 11.

<sup>494</sup> *In re Kenyon*, 9 Haw. 32, 33 (1893).

although Chairman Dole issued it, the warrant lacked verification that the Councils had authorized it, and (3) the warrant failed to specify the grounds for Sheldon's arrest.<sup>495</sup>

Circuit Court Judge Frear delivered his decision on February 24, ruling that Sheldon was held under a valid warrant of arrest issued by a competent authority.<sup>496</sup> The decision was appealed to the Hawai'i Supreme Court and a hearing was held on March 21.<sup>497</sup> Shortly thereafter, due to the vacancy on the supreme court from Sanford Dole's resignation, Judge Frear joined the Hawai'i Supreme Court, and participated in ruling on the merits of his own decision.<sup>498</sup> Portions of Frear's decision were adopted by the Hawai'i Supreme Court as part of its ruling.<sup>499</sup>

The court first began its analysis by clarifying its role within the Provisional Government. Because the Provisional Government purportedly took possession of all government property and established itself as the government of Hawai'i by abrogating the monarchy, the court determined:

[I]t is the *de facto* Government. It is the Government and the only Government now existing in the Hawaiian Islands. The Courts of this country are not at liberty to discuss the question of the legal existence of the Government of which they form a part, and the laws of which they are called upon to administer.<sup>500</sup>

Ashford asserted that the warrant was issued not by a court of judicial character, but by a body exercising legislative functions—thus, because legislative bodies have no implied authority to punish generally for contempt, the warrant was invalid. Despite citing U.S. Supreme Court precedent stating that a “legislative body has no inherent power to punish generally for contempts,” Ashford failed to convince the Hawai'i Supreme Court of his argument.<sup>501</sup> While acknowledging that it was “doubtful if Congress could enact a law authorizing itself to punish for contempt persons not members of that body,”<sup>502</sup> the supreme court explained that “in this country, the legislative body” passed this law and “not being trammelled by any inhibition of any constitutional provision,” proceeded to expressly give itself authority to punish for contempts.<sup>503</sup> The court concluded that

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<sup>495</sup> *Id.* at 34.

<sup>496</sup> *Id.* at 33, 39.

<sup>497</sup> *Id.* at 32.

<sup>498</sup> *Id.* at 33.

<sup>499</sup> *See id.* at 35.

<sup>500</sup> *Id.* at 34–35.

<sup>501</sup> *Id.* at 37 (citing *Kilbourn v. Thompson*, 103 U.S. 168 (1880)).

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 38.

the Councils have the “inherent power also to exercise this authority in so far as the same is essential to the performance of their other functions.”<sup>504</sup>

Not surprisingly, Sheldon lost and was remanded to the custody of the Marshal.<sup>505</sup> Sheldon’s imprisonment did little to deter other journalists, and when he was released, he and other journalists continued to publish opposition pieces. Dole responded swiftly in his endeavor to quash all opposing viewpoints. Through the enactment of laws and vigorous judicial enforcement, Dole effectively accomplished this goal. Shortly after the Hawai’i Supreme Court rendered its decision, on May 4, 1893, Dole promulgated Act 33 which was entitled, “*An Act to Regulate the Printing and Publishing of Newspapers and Publications.*”<sup>506</sup> This law was ostensibly enacted to protect “the rights of individuals as well as of the public in general,”<sup>507</sup> however, this law actually did the opposite—it limited publication of newspapers and prints that disseminated “news, information, instruction” to only those deemed “responsible individuals or companies.”<sup>508</sup> The Minister of the Interior was charged with issuing certificates to permitted individuals or companies.<sup>509</sup> But these initial laws (Act 8 and Act 33), and a supreme court decision affirming the legality of the government’s actions were just the start.

As noted by Kuykendall, Dole even targeted journalists who published “libelous” articles in the continental United States. For example, Charles Nordhoff of the New York *Herald* arrived in Honolulu on April 7, 1893.<sup>510</sup> Nordhoff, who was “predisposed to favor the queen,” drew the ire of annexationists.<sup>511</sup> When his articles began to return from New York, one pro-annexationist threatened to “tar and feather” Nordhoff.<sup>512</sup> The legal actions taken by Dole against Nordhoff were covered in a report issued by James H. Blount, a special commissioner appointed by President Grover Cleveland to investigate the Provisional Government’s request for annexation to join the United States.<sup>513</sup> Blount maintained that Dole’s

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<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 40.

<sup>506</sup> Act of May 4, 1893, To Regulate the Printing and Publishing of Newspapers and Other Publications, in LAWS OF THE PROVISIONAL GOVERNMENT OF THE HAWAIIAN ISLANDS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS: ACTS 1 TO 86, *supra* note 474, at 63–66.

<sup>507</sup> *Id.* at 63.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.* at 63–64.

<sup>510</sup> See 3 KUYKENDALL, *supra* note 370, at 624.

<sup>511</sup> *Id.* at 626.

<sup>512</sup> *Id.*

<sup>513</sup> See H. EXEC. DOC. NO. 48, 53d Cong., 2d Sess. (1893), reprinted in FOREIGN

handling of the entire affair appeared “to have been animated by the spirit of crushing out all opposing opinions by forceful methods.”<sup>514</sup>

Dole’s tactics for silencing the opposition had thus far been effective. After the successful implementation of various measures and a supreme court decision ruling in his favor, Dole now looked toward securing the interests of the government through the constitution. After nearly fifty years of constitutionally protected freedom of speech in the Kingdom of Hawai‘i, on July 4, 1894, Article 3 of the Constitution of the Republic of Hawai‘i was changed to permit the Legislature to enact laws that would prohibit “seditious language.”<sup>515</sup>

All men may freely speak, write and publish their sentiments on all subjects; and no law shall be enacted to restrain the liberty of speech or of the press; but all persons shall be responsible for the abuse of such right. Provided however, that the Legislature may enact such laws as may be necessary, to restrain and prevent the publication or public utterance of indecent or seditious language.<sup>516</sup>

Thereafter, the legislature enacted Chapter 96, which related to “Seditious Offenses.”<sup>517</sup> While it was similar in form and language to Act 3, the law included new language that allowed a Judge or Magistrate to not only penalize a journalist with steep fines or imprisonment at hard labor, it could also suspend any further publication of the newspaper that published

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RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII app. 2, at 422–29 (May 24, 1893).

<sup>514</sup> *Id.* at 427.

<sup>515</sup> HAW. CONST. of 1895, art. III, *in* CONSTITUTION OF THE REPUBLIC OF HAWAII AND LAWS PASSED BY THE EXECUTIVE AND ADVISORY COUNCILS OF THE REPUBLIC (Honolulu, Robert Grieve Steam Book & Job Printer 1895) [hereinafter 1895 CONSTITUTION & LAWS].

<sup>516</sup> The Hawaiian version stated:

Ua hiki i na kanaka a pau ke kamailio me ke keakea ole ia, e kakau a hoolaha i ko lakou manao ma na mea a pau; a aole e hanaia kekahi kanawai e hoohaiki ai i ke kamailio ana, a i ole ia ka papapai; aka, e kau no maluna o na mea a pau ke kaumaha o ka lawelawe hewa ana o ia pono; eia no nae, ua hiki i ka Ahaolelo e hooholo i na kanawai i kupono e kaohi ai a e pale aku ai i ka hoolahaia ana, a i ole ia ke kamailio akeia ana o na olelo pelapela a me na olelo hoala kipi.

HAW. KUMUKANAWAI O KA MAKAHIKI 1895, pauku III, *in* KUMUKANAWAI O KA REPUBALIKA O HAWAII A ME NA KANAWAI I HOHOLOLA E KA AHA HOOKO A ME AHA KUKA O KA REPUBALIKA O HAWAII (Honolulu, Robert Grieve Steam Book & Job Printer 1895).

<sup>517</sup> Act of Mar. 19, 1894, Relating to Persons Having Certain Lawless Intentions, *in* 1895 CONSTITUTION & LAWS, *supra* note 515, at 55; Act of Mar. 19, 1894, ch. 96, §§ 1620–32, *in* THE PENAL LAWS OF THE HAWAIIAN ISLANDS, 1897, at 519–22 (Honolulu, Haw. Gazette Print 1897) [hereinafter 1897 HAW. PENAL LAWS].

the original article.<sup>518</sup> Further, Chapter 96 also included new language that made it a crime to have “lawless intentions”:

If the Marshal or a Deputy Marshal or any Sheriff or Deputy Sheriff knows or has reason to believe that any person has lawless intentions that are hostile to public order, or the established system of Government, he may complain to a Circuit Judge . . . . If it appears to the satisfaction of the Judge that the complainant has reason to believe that the person complained of harbors lawless intentions . . . he shall cause him to be arrested and brought before him by warrant . . . .<sup>519</sup>

If the person was found guilty of “lawless intent,” the applicable punishment was banishment from the country for a minimum of two years.<sup>520</sup> With these questionable measures in place, Dole’s government wielded enormous power that effectively silenced journalists who dared to speak out against the government. For example, Edmund Norrie, the editor of *Hawaii Holomua*, was jailed for writing “Mr. Dole is President of Hawaii through treason, fraud and might. He will never get there through RIGHT.”<sup>521</sup>

After the unsuccessful rebellion in 1895 that sought to restore the queen to her throne, journalists John E. Bush, E.C. Crick, Daniel Logan, Joseph Nāwahī, Edmund Norrie, Thomas Tamaki Spencer, W.J. Kapi, J.K. Kaunamano, G. Carson Kenyon, and F.J. Testa were all arrested for conspiracy and held in prison with excessively high bail.<sup>522</sup> For example, Nāwahī’s bail was set for an astounding \$10,000.<sup>523</sup> Journalists were the target of the government during this time because, as explained by Edward G. Hitchcock, the Marshal of the Provisional Government and later the Republic of Hawai‘i, “[r]evolutions are not started these days without the aid of newspapers . . . .”<sup>524</sup> Even after martial law was instituted, the

<sup>518</sup> 1897 HAW. PENAL LAWS, *supra* note 517, §§ 1624–25.

<sup>519</sup> *Id.* § 1627.

<sup>520</sup> *Id.* §§ 1627–28.

<sup>521</sup> Edmund Norrie, *The Bishop and Dole*, HAW. HOLOMUA, Nov. 21, 1894, at 2.

<sup>522</sup> See CHAPIN, *supra* note 410, at 103; *see, e.g.*, Republic v. Bush, No. 2106 (Haw. 1st Cir. Ct. Feb. 25, 1895).

<sup>523</sup> J.G.M. SHELDON, KA PUKE MO‘OLELO O HON. IOSEPA K. NĀWAHĪ 141 (J.G.M. Sheldon ed., 1908). In ‘Ōlelo Hawai‘i it states, “I ka ho‘oku‘u ‘ia ‘ana mai o Iosepa Nāwahī mai loko mai o ka hale pa‘ahao ma muli o kona hā‘awi ‘ana i \$10,000 pona . . . .” *Id.* My translation: “After Joseph Nāwahī’s release from prison following his posting of a \$10,000 bond . . . .”

<sup>524</sup> See *Affidavit of Edward G. Hitchcock, In re G. Carson Kenyon* (Nov. 2, 1895), in CORRESPONDENCE BETWEEN THE GOVERNMENT OF THE REPUBLIC OF HAWAII AND HER BRITANNIC MAJESTY’S GOVERNMENT IN RELATION TO THE CLAIMS OF CERTAIN BRITISH SUBJECTS ARRESTED FOR COMPLICITY IN THE INSURRECTION OF 1895 IN THE HAWAIIAN



government sought to keep the journalists jailed because, as Chapin explained, while they were locked up, the “newspapers stopped printing”—an action that pleased *Gazette* editor Wallace Farrington who stated that the imprisoned journalists were “enjoying a long-needed term of rest” while “passing their vacations in Oahu Prison.”<sup>525</sup>

The numerous conspiracy, libel, and “seditious language” cases filed against at least a dozen Hawaiian and Caucasian newsmen during this tumultuous period demonstrate that the government, under Dole’s leadership, vigorously sought to silence any opposing viewpoint. Undoubtedly Dole felt these measures were necessary to ease the path toward annexation. And indeed, how they were portrayed in the papers mattered: Would they be presented as illegal usurpers or as a legitimate, rightful governing entity? Once annexation was secured, however, these concerns were abated and the right to free speech was reestablished.<sup>526</sup> Ironically, however, this was a necessary result because under the Organic Act, the U.S. Constitution extended to Hawai‘i, and any laws deemed repugnant to the Constitution (*i.e.* laws that curtailed freedom of speech<sup>527</sup>) necessitated abrogation.

Numerous scholars seek to write about this controversial time period. And many, like Judge Burns, rely on the work contained in Kuykendall’s massive 764-page tome that depicts the events leading up to annexation. Dole’s draconian tactics vividly illustrate the lengths that a government will go to control its own version of truth. And while Kuykendall at times attempted to provide context to this narrative by raising competing ideas, and opposing viewpoints raised by Dole’s contemporaries, Kuykendall’s bibliography and endnotes demonstrate a one-sided bias that is impossible to overlook.

To be clear, I do not advocate that all historians, legal scholars, attorneys, and judges arrive at the same conclusion, or have the same opinions. I do, however, expect that we adopt certain principles and standards in conducting responsible historical research. Moreover, I advocate that we shift the paradigm in our current discourse that deems our current methodologies in conducting research about Native Hawaiians “sufficient.” Professor Young stated that this approach does not mean we take “a monolithic approach whereby a party line of political resistance

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ISLANDS, *supra* note 451, at 134.

<sup>525</sup> CHAPIN, *supra* note 410, at 103 (quoting HAW. GAZETTE, Jan 18, 1895).

<sup>526</sup> *Id.*

<sup>527</sup> *See id.* (“While annexation was still pending, they were liable to arrest at any time . . . [but] [a]fter formal annexation, the right to free speech was once again guaranteed, now by the American Constitution.”).

doublespeak creates simplistic 'bad guys and good guys' scenarios for public cheerleading purposes."<sup>528</sup> Instead, he urged that history "be written to more accurately reflect what actually took place in the nineteenth-century by giving voice to the people of that time to tell their stories in ours."<sup>529</sup> By taking this approach, there is no demand to "molding of what it would be most useful to report," but rather it would represent "the most comprehensive presentation of evidence from all sides of an issue to let the reader decide the merits or lack thereof for what is being asserted."<sup>530</sup>

#### IV. CONCLUSION

I ka wā mamua, i ka wā mahope.

The time in front (or the past), the time in back (or the future).<sup>531</sup>

As explained by Dr. Kame'eiehiwa, "the past is referred to as [*k*]a wā mamua, or 'the time in front or before[,] [w]hereas the future[] . . . is [*k*]a wā mahope, or 'the time which comes after or behind.'"<sup>532</sup> Such an orientation means that a Native Hawaiian "stands firmly in the present, with his back to the future, and his eyes fixed on upon the past, seeking historical answers for present-day dilemmas."<sup>533</sup> Thus, it makes sense that much of the work of present day 'Ōiwi scholars is focused on the past—our interpretations of the past inform our present and direct us toward a more knowledgeable future.<sup>534</sup>

By being knowledgeable about our past, it allows us to recognize and spotlight potential threats to our society. As described in Section III.E. above, Sanford B. Dole waged a war on newspaper journalists that published stories for opposing or portraying the Provisional Government, and later the Republic of Hawai'i, and its supporters in a negative light. Hawaiian citizens watched as their Constitution was amended for the first time in over fifty years to include seditious libel. Journalists were jailed, or excessively fined, and dragged into court to defend their stories. Some were faced with the prospect of being forcibly banished from the country. The so-called "winners" and their newspapers told their version of

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<sup>528</sup> Young, *supra* note 390, at 22 (emphasis omitted).

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> See KAME'EIEHIWA, *supra* note 23, at 22.

<sup>532</sup> *Id.* (italicization in original)

<sup>533</sup> *Id.*

<sup>534</sup> See BEAMER, *supra* note 23, at 10.

history—a history that spoke for only five to six percent of the Hawai'i population.

Journalists serve an important function, and part of that function is to hold government officials accountable. When our journalists are silenced, the potential ramifications are far-reaching. Over 100 years later, I find myself writing a law review article, attempting to explain how dangerous it can be to rely on a one-sided account of history. I contend that a history that speaks on behalf of a small minority of the population cannot possibly be presented as “balanced.” And yet, that is what Judge Burns, and many others, attempt to do.

What lessons can we draw from this history? United States President Donald J. Trump, on his first full day in office, opted to “wage war on the media.”<sup>535</sup> President Trump’s chief White House strategist, Stephen K. Bannon, described the media as “the opposition party,”<sup>536</sup> and directed the media to just “keep its mouth shut . . .”<sup>537</sup> White House press secretary, Sean Spicer lambasted the media stating that, “We’re going hold the press accountable . . .”<sup>538</sup> Trump has been openly hostile to the media, including mocking a disabled reporter,<sup>539</sup> encouraging crowds to attack journalists,<sup>540</sup> denying press credentials to outlets like the *Washington Post* when he disliked their coverage,<sup>541</sup> and promising to “open up libel laws”<sup>542</sup> to make it easier for him to sue the *New York Times* and other media outlets.<sup>543</sup>

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<sup>535</sup> Philip Rucker et al., *Trump Wages War Against the Media as Demonstrators Protest His Presidency*, WASH. POST (Jan. 21, 2017), [https://www.washingtonpost.com/politics/trump-wages-war-against-the-media-as-demonstrators-protest-his-presidency/2017/01/21/705be9a2-e00c-11e6-ad42-f3375f271c9c\\_story.html](https://www.washingtonpost.com/politics/trump-wages-war-against-the-media-as-demonstrators-protest-his-presidency/2017/01/21/705be9a2-e00c-11e6-ad42-f3375f271c9c_story.html).

<sup>536</sup> Michael M. Grynbaum, *Trump Strategist Stephen Bannon Says Media Should ‘Keep Its Mouth Shut,’* N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/business/media/stephen-bannon-trump-news-media.html>.

<sup>537</sup> *Id.*

<sup>538</sup> Rucker et al., *supra* note 535.

<sup>539</sup> Glenn Kessler, *Donald Trump’s Revisionist History of Mocking a Disabled Reporter*, WASH. POST (Aug. 2, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/08/02/donald-trumps-revisionist-history-of-mocking-a-disabled-reporter>.

<sup>540</sup> See, e.g., Alexander Burns & Nick Corasaniti, *Donald Trump’s Other Campaign Foe: The ‘Lowest Form of Life’ News Media*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/13/us/politics/donald-trump-obama-isis.html>.

<sup>541</sup> Paul Farhi, *Trump Revokes Post Press Credentials, Calling the Paper ‘Dishonest’ and ‘Phony,’* WASH. POST (June 13, 2016), [https://www.washingtonpost.com/lifestyle/style/trump-revokes-post-press-credentials-calling-the-paper-dishonest-and-phony/2016/06/13/f9a61a72-31aa-11e6-95c0-2a6873031302\\_story.html](https://www.washingtonpost.com/lifestyle/style/trump-revokes-post-press-credentials-calling-the-paper-dishonest-and-phony/2016/06/13/f9a61a72-31aa-11e6-95c0-2a6873031302_story.html).

<sup>542</sup> Eugene Volokh, Opinion, *Donald Trump Says He’ll ‘Open Up Libel Laws,’* WASH. POST (Feb. 26, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/26/donald-trump-says-hell-open-up-libel-laws>.

Why does President Trump hate the media so much? Perhaps because they challenge his authority and refuse to allow him to tell his version of “facts.” Whether it is his claims that his inauguration crowd size was the “largest audience to ever witness an inauguration,”<sup>544</sup> or his assertion that the science behind climate change is a “Chinese hoax,”<sup>545</sup> or his claims that “there were 3 million to 5 million illegal votes cast in last November’s election,”<sup>546</sup>—journalists can barely keep up with the diluge of vitriolic hyperbole, mistruths, or outright lies being spewed.

As eloquently stated by historian Shana Bernstein,

It is deeply disturbing to find ourselves at a historical moment where misguided appeals to hate and fear seem to be regaining traction. Our president boldly disregards factual information, and his spokesperson Kellyanne Conway suggests that “alternative facts” are just as real as actual facts, and in the process dismisses the historical lessons that may be drawn when politicians replace fact with exaggeration—or worse, outright fiction.<sup>547</sup>

She urges us to “relearn the lessons of history and apply its tools of critical thinking to our current moment.”<sup>548</sup> Now, more than ever is it crucial for us

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According to prominent First Amendment lawyer Susan Seager, Donald Trump and his affiliated companies have been involved in a “mind-boggling 4,000 lawsuits over the last 30 years and sent countless threatening cease-and-desist letters to journalists and critics.” Susan E. Seager, *Donald J. Trump Is a Libel Bully But Also a Libel Loser*, 32 COMM. LAW, Fall 2016, at 1-11.

<sup>543</sup> Volokh, *supra* note 542.

<sup>544</sup> President Trump’s press secretary stated, “This was the largest audience to ever witness an inauguration—period—both in person and around the globe . . .” Nicholas Fandos, *White House Pushes ‘Alternative Facts.’ Here Are the Real Ones*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html>.

<sup>545</sup> Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/world/asia/china-trump-climate-change.html>.

<sup>546</sup> Danielle Kurtzleben & Jessica Taylor, *This Week in Trump’s “Alternative Facts,”* NPR (Jan. 29, 2017), <http://www.npr.org/2017/01/29/512068148/this-week-in-trumps-alternative-facts>; see Glenn Kessler, *Recidivism Watch: Trump’s Claim That Millions of People Voted Illegally*, WASH. POST (Jan. 24, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/01/24/recidivism-watch-trumps-claim-that-3-5-million-people-voted-illegally-in-the-election/>.

<sup>547</sup> Shana Bernstein, Opinion, *How to Use the Past to Fight for Your Rights Today*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/23/opinions/past-still-matters-bernstein-opinion/index.html>.

<sup>548</sup> *Id.*

“to read history with critical and appreciative minds, and to be prepared to fight any attempts to undermine our democracy.”<sup>549</sup>

Some day in the future, histories will be written about this tumultuous political period. In these chaotic times, all of us—law students, legal scholars, attorneys, and judges—should be mindful of these past lessons and our professional obligations to continuously seek the truth. As Professor Cramton explained, the best scholarship is premised on an “endless process of discovery, reflection, and dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding.”<sup>550</sup> If we fail in this endeavor, we needn’t look far to see the results—as Native Hawaiians can attest, histories written using one-sided or “alternative facts” can have devastating and long-term impacts on an entire society.

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<sup>549</sup> *Id.*

<sup>550</sup> Cramton, *supra* note 34, at 3 (quoting a speech that Cramton gave in 1985).